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Notes

SECTION 13(d) OF THE SECURITIES EXCHANGE ACT: AFTER *TOUCHE ROSS* AND *TRANSAMERICA*, DOES AN ISSUING CORPORATION HAVE AN IMPLIED PRIVATE CAUSE OF ACTION FOR INJUNCTIVE RELIEF?

The burden of enforcing the disclosure requirements of section 13(d) of the Securities Exchange Act statutorily falls upon the SEC. In recent years, however, those persons entitled to such disclosure—issuers of securities registered under the Exchange Act—have attempted to enforce section 13(d) by means of an implied private cause of action for injunctive relief. This Note examines the propriety of such actions, beginning with an analysis of section 13(d)'s historical background and legislative history. The Note then examines the precedent and policy support for an implied private action under section 13(d) and the Supreme Court's current standard for implying such actions. The Note asserts that although this standard will not support an action under section 13(d), the need for supplemental enforcement of the securities laws should be recognized. To this end, the Note concludes, Congress should adopt specific amendments to the Exchange Act that would grant an express private remedy.

INTRODUCTION

SECTION 13(d) was added to the Securities Exchange Act of 1934¹ (Exchange Act) by the Williams Act amendments of 1968.² Under the provisions of section 13(d), any person who acquires more than five percent of an equity security registered under the Exchange Act³ is required to file a Schedule

1. Pub. L. No. 73-291, ch. 404, § 2, 48 Stat. 881 (1934), *codified at* 15 U.S.C. §§ 78a-78kk (1976 & Supp. I 1979).

2. The Williams Act amended the Exchange Act by adding sections 13(d) and (e) and sections 14(d)-(f), Pub. L. No. 90-439, 82 Stat. 454 (1968), *codified at* 15 U.S.C. §§ 78m(d) and (e), 78n(d)-(f) (1976). The Williams Act also amended section 12(i), 15 U.S.C. § 78l(i) (1976). *See* notes 28-56 *infra* and accompanying text.

3. "Almost any arrangement that takes A's money and gives it to B to manage for [A's] benefit may be deemed to be a security." D. VAGTS, *BASIC CORPORATION LAW* 832 (1979).

An "equity security" is one that represents a shareholder's interest rather than a creditor's The borderline is somewhat difficult to draw at times but factors pointing to an equity security include entitlement to dividends (not interest), a right to vote, an absence of a right to a return of the amount contributed at a fixed date.

Id. at 826. Equity security is commonly represented by shares of stock. Registration under

13D⁴ with the Securities and Exchange Commission (the SEC) within ten days of the acquisition. A copy of the statement must also be sent to the issuing corporation.⁵ The Schedule 13D must disclose the purchaser's⁶ identity and background, purpose in acquiring the stock, source of financing, extent of acquisition and arrangements or contracts with other persons concerning the stock.⁷

the Exchange Act involves registration of the security under section 12 of the Exchange Act, 15 U.S.C. § 78f (1976). *Id.* at 831.

4. 15 U.S.C. § 78m(d) (Supp. I 1979), 17 C.F.R. §§ 240.13d-1—13d-102 (1980).

5. The issuing corporation is sometimes referred to as the "target corporation." *See, e.g., Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 247, 249 (1967) [hereinafter *Senate Hearings*]. For the purposes of this Note, however, "issuing corporation" will be used to avoid confusion with legislation specifically directed at tender offers. For a discussion of this distinction, see note 33 *infra*.

6. A person may also acquire stock by inheritance or gift. *See* note 41 *infra* and accompanying text. For the purposes of this Note, however, the acquirer will be referred to as the purchaser.

7. 15 U.S.C. § 78m(d)(1) (Supp. I 1979) provides:

Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78f of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78f(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, sent to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts

A purchaser who has acquired the requisite amount of stock and either fails to file a Schedule 13D⁸ or files a false or misleading statement⁹ becomes subject to express statutory sanctions. One such sanction, imposed on a purchaser for filing a false or misleading statement, makes that individual liable under section 18(a) of the Exchange Act to any person "who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance"¹⁰ Moreover, if no statement is filed, the SEC may seek to compel the filing of a truthful Schedule 13D by bringing a suit for injunctive relief under the authority of section 21 of the Exchange Act.¹¹

If the issuing corporation or its shareholders fail to satisfy either the purchaser/seller or reliance requirements of section 18(a),¹² or if the SEC fails to seek enforcement under section 21,¹³ the purchaser's violation of section 13(d) will not be remedied. To alleviate this problem, the federal courts have implied a private cause of action for injunctive relief under section 13(d) for both

or calls, guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

8. See notes 69-75 *infra* and accompanying text.

9. See notes 81-131 *infra* and accompanying text.

10. 15 U.S.C. § 78r(a) (1976). Section 18(a) does not create liability for failure to file. See notes 198, 201 *infra* and accompanying text.

11. 15 U.S.C. § 78u (1976). See notes 282-84 *infra* and accompanying text.

12. The express damage remedy under section 18(a) is rarely litigated because of its "double-barreled" causation requirement. 3 L. LOSS, SECURITIES REGULATION 1752 (2d ed. 1961).

Not only must the Section 18(a) plaintiff demonstrate that he bought or sold the security and that the statement or omission sued upon was false or misleading, he must also shoulder the heavier burden of proving (1) that his damages resulted from reliance on the false or misleading information, and (2) that the purchase or sale price was affected by that information.

Report of the Advisory Comm. on Corporate Disclosure to the Securities and Exchange Commission, 95th Cong., 1st Sess. 678 (1977). See *Stromfeld v. Great Atlantic & Pacific Tea Co.*, 484 F. Supp. 1264 (S.D.N.Y. 1980). In *Stromfeld* a shareholder's suit for damages under section 13(d) was dismissed, because the shareholder failed to meet the section 18(a) causation requirements. The court noted that "[s]ection 18 requires that a plaintiff establish knowledge of and reliance upon the alleged misstatements contained in any document filed with the S.E.C." *Id.* at 1268. *Accord*, *W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800 (D. Neb. 1979); *Myers v. American Leisure Time Enterprises, Inc.*, 402 F. Supp. 213 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 312 (2d Cir. 1976). Because of the difficult burden of proving causation under section 18(a), one writer contends that an implied cause of action for damages should exist under section 13(d) without a showing of actual reliance and causation. See Comment, *Private Rights of Action for Damages Under Section 13(d)*, 32 STAN. L. REV. 581 (1980).

13. See notes 296-323 *infra* and accompanying text.

the issuing corporation and its shareholders.¹⁴ Of these potential plaintiffs, the issuer is generally in a better position than its shareholders to enforce section 13(d) because it has the resources and self-interest "vital to maintaining an injunctive action."¹⁵

Until recently, no federal court had denied an issuing corporation the right to assert an implied cause of action for injunctive relief under section 13(d). In 1980, however, the District Court for the Northern District of Illinois dismissed an issuing corporation's injunctive action in *Gateway Industries, Inc. v. Agency Rent A Car*.¹⁶ *Gateway* held that "section 13(d) cannot be fairly read to imply a private right of action for injunctive relief on behalf of issuing corporations such as Gateway."¹⁷ The district court's decision was based on two recent Supreme Court cases—*Touche Ross & Co. v. Redington*¹⁸ and *Transamerica Mortgage Advisors, Inc. v. Lewis*¹⁹—which denied the implication of private damage remedies under the federal securities laws.²⁰

The *Gateway* decision was rejected by the District Court for the Western District of Michigan in *Kirsch Co. v. Bliss & Laughlin Industries, Inc.*²¹ and was later cited with approval by the District Court for the Eastern District of Wisconsin in *Sta-Rite Industries, Inc. v. Nortek, Inc.*²² This conflict among the district courts calls into question the propriety of granting to an issuing corporation an implied private cause of action for injunctive relief under section 13(d).

In analyzing the issue of whether an issuing corporation may enforce section 13(d) disclosures through an implied cause of action for injunctive relief, this Note first discusses the historical background of section 13(d).²³ The Note then analyzes the Supreme Court's standard for implying private causes of action from federal regulatory statutes.²⁴ In addition, the Note applies

14. See notes 81–99 *infra* and accompanying text.

15. *GAF Corp. v. Milstein*, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). See notes 81–90 *infra* and accompanying text.

16. 495 F. Supp. 92 (N.D. Ill. 1980). See notes 100–18 *infra* and accompanying text.

17. 495 F. Supp. at 99.

18. 442 U.S. 560 (1979).

19. 444 U.S. 11 (1979).

20. See notes 173–235 *infra* and accompanying text.

21. 495 F. Supp. 488 (W.D. Mich. 1980). See notes 119–26 *infra* and accompanying text.

22. 494 F. Supp. 358 (E.D. Wis. 1980). See notes 127–31 *infra* and accompanying text.

23. See notes 28–136 *infra* and accompanying text.

24. See notes 137–235 *infra* and accompanying text.

that standard to section 13(d)²⁵ and discusses the policy considerations involved in granting or denying an issuing corporation injunctive relief under section 13(d).²⁶

Touche Ross and *Transamerica* have raised doubts about the enforceability of the Williams Act. The SEC, therefore, has proposed an amendment to the Exchange Act which would expressly provide for private causes of action. This Note outlines and briefly discusses that proposal.²⁷ The Note concludes that, because of the present Court's strict standard for implication and because the Court has rejected arguments in favor of supplemental enforcement, Congress must grant to issuing corporations an express private cause of action for injunctive relief under section 13(d).

I. HISTORICAL BACKGROUND

A. *The Williams Act*

An axiom of American securities regulation holds that "[t]he keystone of the entire structure of Federal securities legislation is disclosure."²⁸ Yet, in the early 1960's, it became apparent that an important part of American business strategy—the corporate takeover attempt—was not subject to the far-reaching disclosure requirements of the securities laws.²⁹ Prior to that time, the absence of disclosure was not a problem because "corporate takeover attempts had typically involved either proxy solicitations, regulated under § 14 of the Securities Exchange Act,^[30] . . . or exchange offers of securities, subject to the registration requirements of the 1933 Act^[31]"³² However, the securities laws substantially failed to regulate corporate takeovers by the means of cash tender offers or, more important to this inquiry, the open market acquisition of an issuing corporation's stock.³³

25. See notes 236–95 *infra* and accompanying text.

26. See notes 296–339 *infra* and accompanying text.

27. See notes 340–50 *infra* and accompanying text.

28. *Report of Special Study of Securities Markets of the Securities and Exchange Commission*, H.R. DOC. NO. 95, 88th Cong., 1st Sess. pt. 3, at 1 (1963).

29. 113 CONG. REC. 854, 24,664 (1967).

30. 15 U.S.C. § 78n (1976). "A proxy is a power given by a shareholder to another person to vote his (or her) share(s) of stock." D. VAGTS, *supra* note 3, at 830.

31. 15 U.S.C. § 77e (1976).

32. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22 (1977). See notes 164–71 *infra* and accompanying text.

33. S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967). A former Chairman of the Commission explained such transactions, stating:

In 1965, Senator Harrison Williams introduced a bill designed to close this regulatory gap.³⁴ He maintained that some form of disclosure of these unregulated takeover attempts was "the only way that corporations, their stockholders, and employees" could adequately prepare "in advance to meet the threat of the takeover specialist."³⁵ His original bill, S. 2731,³⁶ required that "any substantial accumulation of shares . . . must be preceded by the filing of public information"³⁷ S. 2731 was designed to protect incumbent management from "industrial sabotage" resulting from reckless corporate raids on "proud old companies."³⁸

S. 2731 was later revised on the recommendation of the SEC.³⁹ At that time, the SEC foreshadowed the present section 13(d) by proposing that disclosure be made within five days after the acquisition.⁴⁰ This allowance for after-the-fact disclosure was advised because, as the SEC noted, "[W]e envision some types of situations in which compliance with an advance notice requirement would be impossible, such as acquisition by inheritance or by gift

A tender offer is quite different from the ordinary market transaction with which the average investor is familiar. In so far as it is an offer at all it is subject to complex and sometimes deceptive conditions. Rather it is an invitation to the public security holder who "tenders" his security to give the other party an option—to be exercised only if certain minimum shares are tendered within a specified time and perhaps specifying a maximum which the original "offeror" is prepared to take—but giving him discretion to accept a lesser or larger amount or to extend the time limits. Tendering in response to such an offer involves deposit of the public security holder's shares or obtaining a guarantee from a stock exchange member or other financially responsible person that they will be deposited.

Not all acquisitions of substantial blocks of securities are made by means of tender offers. A corporation or individual—or group of corporations or individuals—can acquire a substantial block of stock of a company through a program of purchases in the open market, or through privately-negotiated purchases from substantial stockholders, and thus achieve the power to influence the management and control of the corporation, without the other stockholders even becoming aware of this development.

Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 11, 14 (1968) (statement of Manuel F. Cohen).

34. 111 CONG. REC. 28,259 (1965).

35. *Id.* Senator Williams remarked: "In recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves." *Id.* at 28,257.

36. S. 2731, 89th Cong., 1st Sess. (1965).

37. *Id.* at 28,259.

38. *Id.* at 28,257-58.

39. 112 CONG. REC. 19,003 (1966).

40. *Id.* at 19,004, 19,006. As enacted, section 13(d) requires disclosure within ten days after the acquisition. 15 U.S.C. § 78m(d)(1) (Supp. I 1979) (set forth in full in note 7 *supra*).

of which the recipient had no advance notice."⁴¹ Moreover, Senator Williams remarked that "disclosure after the transaction avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoids prematurely disclosing the terms of privately negotiated transactions."⁴²

S. 2731 was not enacted, but was later reintroduced in 1967 as S. 510.⁴³ Hearings were held on S. 510⁴⁴ and Manuel F. Cohen, Chairman of the SEC, urged passage with extensive testimony and statements. There were, however, critics of S. 510⁴⁵ who asserted that requiring disclosure of cash tender offers and open market acquisitions would give incumbent management the upper hand in the battle for corporate control.⁴⁶ This outcome was thought to be undesirable because it might serve to reinforce complacent management at the expense of healthy change.⁴⁷

In response, the proponents of S. 510 stressed that the bill could be drafted to avoid giving incumbent management an undesirable advantage in the battle for control.⁴⁸ The House Report emphasized that, in its final form, the Williams Act:

avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and man-

41. *Id.* at 19,004.

42. 113 CONG. REC. 856 (1967).

43. 90th Cong., 1st Sess. (1967). The bill was co-sponsored by Senator Thomas Kuchel. 113 CONG. REC. 854 (1967). S. 510 had the full support of the SEC, the New York Stock Exchange, and the American Stock Exchange. *Id.* at 24,665.

44. *Senate Hearings, supra* note 5; *Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. (1968) [hereinafter *House Hearings*].

45. *House Hearings, supra* note 44, at 64 (statement of Jordan H. Eskin). See also *Senate Hearings, supra* note 5, at 136-39 (statement of Professor Robert H. Mundheim); *id.* at 128-29 (statement of Arthur Fleischer); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967).

46. See generally Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231 (in reply to Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966)).

47. W. PAINTER, *THE FEDERAL SECURITIES CODE AND CORPORATE DISCLOSURE* 387-88 (1979).

48. 113 CONG. REC. 856 (1967). S. 510 sought to parallel the neutrality of the existing proxy regulations. *Id.* at 24,664. Neutrality is achieved in the Williams Act and the proxy regulations by a grant of control to the SEC over the regulated conduct. In a proxy contest this control is characterized by concerted attempts to avoid interfering with the strategy of the participants. See *Hearings on S. 879 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. 1695, 1696 (1956) (remarks of former SEC Chairman Armstrong).

agement equal opportunity to fairly present their case.⁴⁹

After being unanimously recommended by the congressional committees, S. 510 was enacted as an amendment to the Exchange Act on July 29, 1968.⁵⁰

Section 13(d) was one of S. 510's principal disclosure provisions.⁵¹ This section, along with its implementing rules,⁵² was intended to make public every stock acquisition which could affect the control of a corporation.⁵³ Section 13(d) disclosure made "the relevant facts known so that shareholders would have a fair opportunity to make [investment] decisions."⁵⁴ Information concerning the purchaser's plans in acquiring the stock "if known to investors, might substantially change the assumptions on which the market price [of the issuing corporation's stock] is based."⁵⁵ "Thus, the objective of Section 13(d) was to provide to shareholders and the marketplace relevant information and a fair opportunity to evaluate the securities of a company in response to acquisitions with the potential to affect or change control of the company."⁵⁶

49. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 1, 3, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811, 2813. See also S. REP. NO. 550, 90th Cong., 1st Sess. (1967).

50. As originally enacted, the section 13(d) disclosure requirements were not triggered until a purchaser had acquired more than 10% of an issuer's stock. In 1970 the amount of stock required for disclosure was lowered from 10% to 5%. Section 13(d)(1) of the Exchange Act, as amended by Pub. L. No. 91-567, § 1, 84 Stat. 1497 (1970), codified at 15 U.S.C. § 78m(d)(1) (Supp. I 1979). It appears that the amount was lowered to increase the number of purchasers who would file. In some corporations if a purchaser acquired 10% he or she would also acquire control. If the purchaser had to report at 5%, the investor in the marketplace would have been warned before actual control at 10% occurred. S. REP. NO. 1125, 91st Cong., 2d Sess. 3 (1970). See also *Hearings to Ascertain the Views of Hamer H. Budge, Chairman of the Securities and Exchange Commission, on Problems in the Securities Industry Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 15 (1969).

51. See Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853 (1971).

52. Schedule 13D and its accompanying rules may be found at 17 C.F.R. §§ 240.13d-1—13d-102 (1980).

53. *Securities and Exchange Commission Report on Tender Offer Laws to the Senate Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 48 (1980) [hereinafter *Commission Report*].

54. S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967) (noted in *Commission Report*, *supra* note 53, at 49).

55. *Id.*

56. *Commission Report*, *supra* note 53, at 49.

B. Case Law

Unlike other sections of the securities laws,⁵⁷ section 13(d) does not expressly provide for private causes of action. Nevertheless, the Supreme Court has held that in some circumstances a private cause of action may be implied from elements of the federal securities laws, even though the specific provisions are silent as to private remedies.⁵⁸ The Court has reasoned that if the congressional purpose in enacting the statute would be undermined without private enforcement, a private cause of action could be implied in favor of those who were intended to be protected by the statute.⁵⁹

*J.I. Case Co. v. Borak*⁶⁰ is the seminal case for the Court's recognition of implied private remedies under the federal securities laws. In *Borak*, a shareholder of the J.I. Case Company alleged that the merger of Case and American Tractor Corporation was affected by the circulation of false and misleading proxy statements in violation of section 14(a) of the Exchange Act.⁶¹ The trial court held that it had no power to redress the alleged violations under section 14(a) and that under section 27 of the Exchange Act, it could grant only declaratory relief.⁶² The Court of

57. See, e.g., Securities Act of 1933, §§ 11, 12, 15, 15 U.S.C. §§ 77k, 77l, 77o (1976); Exchange Act, §§ 9, 16, 18, 20, 15 U.S.C. §§ 78i, 78r, 78t (1976).

58. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 25 (referring to *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), discussed in text accompanying notes 60-68 *infra*).

59. *Id.* at 25. The concept of implication "developed in the context of the tort law . . ." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 281 (1977) (citing RESTATEMENT OF TORTS § 286(a) (1938), which provides:

The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if . . . the intent of the enactment is exclusively or in part to protect an interest of the other as an individual . . .).

60. 377 U.S. 426 (1964).

61. *Id.* at 427. 15 U.S.C. § 78n(a) (1976) provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange pursuant to section 78f of this title.

The relevant SEC prescription was rule 14a-9. 17 C.F.R. § 240.14a-9 (1980).

62. 377 U.S. at 427-28. 15 U.S.C. § 78aa (1976) provides in part:

The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the

Appeals for the Seventh Circuit reversed, holding that federal courts are empowered to grant remedial relief under section 14(a).⁶³ In an opinion by Justice Clark, the Supreme Court found that shareholders possessed an implied cause of action as to both derivative and direct causes of action for losses resulting from deceptive proxy solicitations in violation of section 14(a).⁶⁴

Justice Clark reasoned that, although section 14(a) makes no reference to private causes of action, "among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."⁶⁵ Justice Clark viewed the threat of civil damages or private injunctive relief as a "necessary supplement to Commission action,"⁶⁶ serving as an "effective weapon in the enforcement of the proxy requirements."⁶⁷ He concluded that, although "federal courts have the power to grant all necessary remedial relief . . . [w]hatever remedy is necessary must await the trial on the merits."⁶⁸

While *Borak* involved private remedial relief under section 14(a), the Court in *Rondeau v. Mosinee Paper Corp.*⁶⁹ also considered the merits of a petition by an issuing corporation for injunctive relief under section 13(d). In *Rondeau*, the issuing corporation, Mosinee Paper, brought suit to enjoin the purchaser from voting his stock and from acquiring additional stock and to compel him to divest himself of stock already purchased.⁷⁰ The purchaser, Rondeau, had failed to file a Schedule 13D because of his unfamiliarity with the securities laws.⁷¹ When Rondeau learned of his obligation, he filed a truthful Schedule 13D. The trial court granted summary judgment to Rondeau, since Mosinee Paper could not prove that it suffered the irreparable harm neces-

rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

63. *Borak v. J.I. Case Co.*, 317 F.2d 838, 849 (7th Cir. 1963).

64. 377 U.S. at 431.

65. *Id.* at 432.

66. *Id.* See notes 296-323 *infra* and accompanying text.

67. 377 U.S. at 432.

68. *Id.* at 435.

69. 422 U.S. 49 (1975).

70. *Id.* at 55.

71. *Id.* at 53.

sary to sustain injunctive relief.⁷² The Court of Appeals for the Seventh Circuit reversed and held that irreparable harm did not need to be shown for Mosinee Paper to obtain injunctive relief for Rondeau's violation of section 13(d).⁷³

The narrow issue addressed on certiorari was whether the "record supports the grant of injunctive relief"⁷⁴ In an opinion by Chief Justice Burger, the Court answered this question in the negative and reversed the Seventh Circuit by holding that private litigants must show "irreparable harm" before they can obtain injunctive relief in a suit under section 13(d).⁷⁵

Because of the decision on this issue, the more fundamental question—whether the corporation was entitled to bring the action in the first instance—was not resolved. The Court, however, recognized the issue:

Although neither the availability of a private suit under the Williams Act nor respondent's standing to bring it has been questioned here, this cause of action is not expressly authorized by the statute or its legislative history. Rather, respondent is asserting a so-called implied private right of action established by cases such as *Borak*.⁷⁶

The Court's citation of *Borak* may indicate that the Court had considered and accepted the issuing corporation's standing under section 13(d) to assert an implied injunctive action, though it did not expressly so rule.⁷⁷ Moreover, Chief Justice Burger emphasized that the case "involve[d] only the availability of injunctive relief to remedy a § 13(d) violation *following compliance*."⁷⁸ He cautioned that the case was not a decision on "whether or under what circumstances a corporation could obtain a decree enjoining a shareholder who is *currently in violation* of § 13(d) from acquiring further shares, exercising voting rights, or launching a takeover bid, pending compliance with the reporting requirements."⁷⁹ As another court has noted, these two comments "add up to a suggestion that the issuing corporation has a right to injunctive

72. *Mosinee Paper Corp. v. Rondeau*, 354 F. Supp. 686, 693 (W.D. Wis. 1973). See generally *Kimberly Knitwear, Inc. v. Kimberly Stores, Inc.*, 331 F. Supp. 1339, 1342 (W.D. Mich. 1971).

73. *Rondeau v. Mosinee Paper Corp.*, 500 F.2d 1011, 1016-17 (7th Cir. 1974).

74. 422 U.S. at 57.

75. *Id.* at 61.

76. *Id.* at 62.

77. See *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1223 (4th Cir. 1980), cert. denied, 449 U.S. 1101 (Jan. 12, 1981), discussed in text accompanying notes 91-99 *infra*.

78. 422 U.S. at 59 n.9 (emphasis added).

79. *Id.* (emphasis added).

relief prior to compliance”⁸⁰

Although *Rondeau* did not expressly hold that a private cause of action exists under section 13(d), the courts of appeals which have confronted the issue have held that an issuing corporation does have standing to sue for an injunction under section 13(d). The first court to so hold was the Court of Appeals for the Second Circuit in *GAF Corp. v. Milstein*.⁸¹ *Milstein* expressly held that an issuer does have standing to seek implied injunctive relief to remedy a purchaser's false or misleading Schedule 13D.⁸²

In its complaint, GAF alleged that the purchasers, the Milsteins, violated section 13(d) in two ways: by failing to file the required Schedule 13D and later by filing a false statement. The district court dismissed the case for failure to state a claim on which relief could be granted.⁸³ On appeal, the Second Circuit reversed and remanded the case for a determination of Milstein's liability under section 13(d) and the nature of appropriate relief.⁸⁴

The appellate court noted that the Milsteins did not dispute the existence of a private right of action under section 13(d) and stated that “[t]he teachings of [*Borak*] are part of the ABC's of securities law.”⁸⁵ Likewise, the Milsteins acquiesced to the standing of GAF as the issuer to assert the implied cause of action for injunctive relief.⁸⁶ In discussing this concession, the court asserted that for practical reasons the standing of GAF was compelling: “GAF, as the issuer, unquestionably is in the best position to enforce section 13(d).”⁸⁷ Similarly, GAF could constantly monitor transactions in its stock and therefore best know whether someone had failed to file a disclosure statement.⁸⁸ The court also recognized that GAF “has not only the resources, but the self-interest so vital to maintaining an injunctive action.”⁸⁹ The opinion concluded “that the obligation to file *truthful* statements is implicit in the obligation to file with the issuer, and *a fortiori*, the issuer has

80. *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1222 n.5 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (Jan. 12, 1981).

81. 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

82. Although *Bath Indus., Inc. v. Blot*, 427 F.2d 97 (7th Cir. 1970) was decided before *Milstein*, in *Bath* the target corporation's standing under section 13(d) was assumed without discussion.

83. *GAF Corp. v. Milstein*, 324 F. Supp. 1062, 1073 (S.D.N.Y. 1971).

84. 453 F.2d at 722.

85. *Id.* at 719.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

standing under section 13(d) to seek relief in the event of a false filing."⁹⁰

The most recent court of appeals decision to reaffirm *Milstein's* holding was *Dan River, Inc. v. Unitex Limited*.⁹¹ Unitex, a manufacturer of textiles in Hong Kong, sought to acquire a substantial equity position in Dan River, a large domestic textile manufacturer. After acquiring more than five percent of Dan River's stock, Unitex failed to file the required Schedule 13D; the company subsequently sold a sufficient amount of stock to drop below the five percent filing requirement.⁹² Unitex then established Mannip, a corporate subsidiary in the British Virgin Islands, for the sole purpose of acquiring Dan River stock.⁹³ Unitex resumed purchasing Dan River stock, again exceeded the five percent disclosure requirement and then transferred all of its Dan River stock to Mannip. After the transfer, Mannip filed a Schedule 13D stating that it had no "present intention to seek control"⁹⁴

Dan River filed suit alleging that Unitex had failed to file a Schedule 13D and that Mannip's Schedule 13D contained misleading statements and omitted other material information.⁹⁵ After initially issuing a temporary restraining order, which was later vacated,⁹⁶ the district court dismissed Dan River's suit on jurisdictional grounds.⁹⁷ The Court of Appeals for the Fourth Circuit reversed, citing *Milstein* as "conclusive on the issue both of standing and of jurisdiction."⁹⁸ The case was remanded to determine whether Unitex had violated section 13(d).⁹⁹ Thus, all courts of appeals which have addressed the issue have granted an issuing corporation standing to seek injunctive relief under section 13(d).

The district courts have been less uniform. In *Gateway Industries, Inc. v. Agency Rent A Car*,¹⁰⁰ for example, the District Court for the Northern District of Illinois announced that "section 13(d)

90. *Id.* at 720 (emphasis supplied).

91. 624 F.2d 1216 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (Jan. 12, 1981).

92. *Id.* at 1218. Unitex denied that this sale was made to avoid filing a Schedule 13D.

93. *Id.* at 1219.

94. *Id.*

95. *Id.*

96. *Id.* at 1221.

97. *Id.*

98. *Id.* at 1223-24 (citing *Chromalloy American Corp. v. Sun Chemical Corp.*, 611 F.2d 240 (8th Cir. 1979), which assumed, without discussion, that an issuing corporation had standing to sue for an implied injunctive action; *General Aircraft Corp. v. Lampert*, 556 F.2d 90 (1st Cir. 1977)).

99. 624 F.2d at 1228.

100. 495 F. Supp. 92 (N.D. Ill. 1980).

cannot be fairly read to imply a private right of action for injunctive relief on behalf of issuing corporations"¹⁰¹ The issuer in that case, Gateway Industries, alleged that although the purchaser, Agency, had filed a timely Schedule 13D, the statement failed to substantively comply with section 13(d).¹⁰² Gateway, therefore, sought an order requiring Agency to divest its Gateway stock.¹⁰³ Additionally, Gateway sought to enjoin Agency from acquiring more stock, from voting the Gateway stock already purchased and from exercising any control over Gateway management.¹⁰⁴

The district court based its decision on *Touche Ross & Co. v. Redington*¹⁰⁵ and *Transamerica Mortgage Advisors, Inc. v. Lewis*.¹⁰⁶ In *Touche Ross*, the Supreme Court dismissed a private litigant's damage action brought under section 17(a) of the Exchange Act,¹⁰⁷ concluding that no evidence of congressional intent to create such a remedy existed.¹⁰⁸ The majority in *Transamerica*, following the *Touche Ross* analysis for implication of private remedies, applied principles of statutory construction to determine whether Congress intended the Investment Advisers Act of 1940¹⁰⁹ (the Advisers Act) to afford a private cause of action.¹¹⁰ In *Transamerica* the Court found an implied private cause of action for equitable relief under section 215¹¹¹ of the Advisers Act,¹¹² but denied an implied private cause of action for damages under section 206¹¹³ of the same Act.¹¹⁴

After reviewing these authorities, the district court in *Gateway* concluded that they compelled analysis of one dispositive issue—whether Congress intended an issuing corporation to have private injunctive relief under section 13(d)—and precluded refer-

101. *Id.* at 99.

102. *Id.* at 94. Gateway argued that the Schedule 13D was defective because "it failed to provide adequate information about Agency; failed to disclose the source of borrowed funds used to finance the purchase of Gateway shares; and misrepresented Agency's purpose in acquiring Gateway shares." *Id.*

103. *Id.* at 94 n.3.

104. *Id.*

105. 442 U.S. 560 (1979), discussed in text accompanying notes 173-214 *infra*.

106. 444 U.S. 11 (1979), discussed in text accompanying notes 215-31 *infra*.

107. 15 U.S.C. § 78q(a) (1976) (set forth in full in note 177 *infra*).

108. See note 105 *supra*.

109. 15 U.S.C. §§ 80b-1 to -21, 54 Stat. 857 (1970).

110. 444 U.S. at 19-24 (1979).

111. 15 U.S.C. § 80b-15 (1976) (set forth in part in note 218 *infra*).

112. 444 U.S. at 19.

113. 15 U.S.C. § 80b-6 (1976) (set forth in full in note 218 *infra*).

114. 444 U.S. at 24.

ence to the general "remedial purposes" of the Act or the "desirability of implying a private right of action."¹¹⁵ In analyzing the statutory language and legislative history, the court determined that the issuer was not within the class of persons especially benefited by section 13(d).¹¹⁶ According to the court, the statutory scheme of enforcement did not allow for an implied private injunctive action in the hands of an issuing corporation.¹¹⁷ Thus, after answering in the negative the dispositive question of congressional intent, the court held that Gateway could not maintain an action for injunctive relief under section 13(d).¹¹⁸

Less than one month after the *Gateway* decision, the District Court for the Western District of Michigan reached the opposite conclusion and held in *Kirsch Co. v. Bliss & Laughlin Industries, Inc.*¹¹⁹ that an issuer did have an implied cause of action for injunctive relief under section 13(d).¹²⁰ In *Kirsch*, the issuing corporation sought injunctive relief to remedy an allegedly false Schedule 13D filed by the purchaser, Bliss & Laughlin Industries.¹²¹ Citing *Gateway*, the purchaser contended that the issuer, Kirsch, had no standing to sue.¹²² Yet the court rejected *Gateway*, reasoning that *Touche Ross* and *Transamerica* did not apply to section 13(d) actions.¹²³

The district court distinguished *Touche Ross* and *Transamerica* on the grounds that "(1) the cases involve[d] damages rather than injunctive relief; and (2) there was no public interest requiring full and truthful disclosure."¹²⁴ However, *Touche Ross* and *Transamerica* cannot be distinguished so easily. Both cases held that the implication of *any* private remedy from a federal statute is a matter of statutory construction.¹²⁵ Moreover, the informational purpose of section 13(d) is not unique in federal securities

115. 495 F. Supp. at 97.

116. *Id.* at 98-99.

117. *Id.* at 98.

118. *Id.* at 101.

119. 495 F. Supp. 488 (W.D. Mich. 1980).

120. *Id.* at 490-92. To remedy the purchaser's violation of section 13(d), the court enjoined Bliss & Laughlin Industries from acquiring any additional stock in Kirsch for a period of 30 days. This period of suspension, however, would not commence until Bliss & Laughlin filed a truthful Schedule 13D and mailed a copy of its Schedule 13D to each Kirsch shareholder of record as of the date of the violation. *Id.* at 502.

121. *Id.* at 489.

122. *Id.* at 490.

123. *Id.* at 491.

124. *Id.*

125. 442 U.S. at 568; 444 U.S. at 15. Indeed, the Court in *Transamerica* applied the *Touche Ross* statutory construction standard in determining whether section 215 of the

law; all federal securities laws, including those construed in *Touche Ross* and *Transamerica*, have as their fundamental purpose the disclosure of information for the benefit of the investing public.¹²⁶

Exactly one month after *Kirsch* was decided, the District Court for the Eastern District of Wisconsin chose to reject *Kirsch* in *Sta-Rite Industries, Inc. v. Nortek, Inc.*¹²⁷ by dismissing an issuing corporation's suit for injunctive relief under section 13(d). In so dismissing, the court "concur[red] with the reasoning of the *Gateway* court and its application of the *Touche [Ross]* and *Transamerica* decisions to private causes of action under § 13(d)."¹²⁸

The district court's opinion stressed the express damage remedy available to purchasers and sellers under section 18(a) as well as the ability of the SEC to seek enforcement under section 21.¹²⁹ The court did recognize as a "legitimate concern," the fact "that relief may not be expeditiously obtained by going through the SEC as opposed to quick access to the courts."¹³⁰ Nevertheless, the court concluded that "[a]bsent any expression of congressional intent to provide an avenue of private equitable relief . . ." it would not "follow the precedent which implies such swift access by private litigants to the courts under § 13(d)"¹³¹

In summary, *Milstein*, *Dan River* and *Kirsch* conclude that, absent private enforcement by the issuing corporation, section 13(d)'s disclosure purpose is thwarted. Private enforcement of the securities laws "provides a necessary supplement to Commission

Advisers Act, 15 U.S.C. § 80b-15 (1976), afforded implied private equitable relief. 444 U.S. at 18-19.

126. See generally H.R. Doc. No. 95, *supra* note 28, at 60-64. The Court in *Touche Ross* noted, "In this case, the § 17(a) reports . . . enable the Commissioner . . . [to] monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers." 442 U.S. at 570. Thus, section 17(a), 15 U.S.C. § 78q(a) (1976), provides for the disclosure of information for the benefit of investors. In *Transamerica*, the Court noted that section 206, 15 U.S.C. § 80b-6 (1976), "broadly proscribes fraudulent practices by investment advisers, making it unlawful . . . to engage in specified transactions with clients *without making required disclosures*." 444 U.S. at 126 (emphasis added).

127. 494 F. Supp. 358 (E.D. Wis. 1980).

128. *Id.* at 362. The district court appears to have misread *Touche Ross* and *Transamerica* as to the nature of relief denied, interpreting the cases as denying "implied private equitable enforcement rights." *Id.* (emphasis added). *Touche Ross* and *Transamerica* denied implied private damage remedies, 442 U.S. at 578, 444 U.S. at 24. Whether this misunderstanding affected the court's decision is uncertain.

129. *Id.* at 361-63. See notes 282-84 *infra* and accompanying text.

130. 494 F. Supp. at 363.

131. *Id.*

action."¹³² This conclusion is rooted in the notion espoused by the Court in *Borak* that judicial relief should be available when necessary to achieve the result sought by Congress.¹³³

Gateway and *Sta-Rite* conclude that the line of authority flowing from the 1964 decision in *Borak* can no longer be considered as controlling¹³⁴—a conclusion derived from the holdings of *Touche Ross* and *Transamerica*. *Touche Ross*, while not overruling *Borak*, limits the precedential authority of *Borak* to its facts:

To the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today.¹³⁵

In *Transamerica*, the Court also limits *Borak*:

While some opinions of the Court [(such as *Borak*)] have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to

132. *J.I. Case Co. v. Borak*, 377 U.S. at 432.

133. *Id.* at 432-33.

134. *Gateway Indus., Inc. v. Agency Rent A Car*, 495 F. Supp. at 96, states that: "The decline of *Borak* renders less than compelling the authority . . . finding an implied private right of action existent under section 13(d)." *Accord*, *Sta-Rite Indus., Inc. v. Nortek, Inc.*, 494 F. Supp. at 361. Professor Loss has commented that *Borak* "reached the right result not for the wrong reason but for no reason at all." 5 L. LOSS, *SECURITIES REGULATION* 2882 (2d ed. Supp. 1969).

135. *Touche Ross & Co. v. Redington*, 442 U.S. at 578. In the previous term, the Court had described *Borak* as an unexplained deviation from the normal pattern of judicial implication:

[T]he Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. [Citations omitted.] The Court has deviated from this pattern on occasion. *See J.I. Case Co. v. Borak*, 377 U.S. 426 [1964] (implying a cause of action under a securities provision describing "unlawful conduct"); *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 [1971] (implying a cause of action under Securities and Exchange Commission Rule 10b-5 . . .); *Machinists v. Central Airlines*, 372 U.S. 682 [1963] (implied cause of action under section of the Railway Labor Act . . .). At least the latter two cases can be explained historically, however. In *Superintendent of Insurance*, the Court explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b-5 cause of action. [Citations omitted.] In *Machinists*, the Court explicitly followed the lead of various earlier cases in which it had implied causes of actions under various sections of the Railway Labor Act

Cannon v. University of Chicago, 441 U.S. 677, 690-93 n.13 (1979). *Cannon* held that section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976), does afford a private cause of action to remedy sex discrimination in federally funded education programs. *See* notes 246-47 *infra* and accompanying text. *See generally* Note, *The Federal Securities Acts: The Demise of The Implied Private Rights Doctrine?*, 1980 U. ILL. L.F. 627 (identifying a dual implied private rights doctrine as illustrated by a comparison of statutes which create a distinct federal right in the plaintiff (*Cannon*) with federal regulatory statutes designed to benefit the public at large (*Touche Ross*)).

effectuate the purposes of a given statute, . . . what must ultimately be determined is whether Congress intended to create the private remedy asserted¹³⁶

Because the *Borak* standard for implication has been discredited, it is necessary to illuminate the current Supreme Court standard for implying private causes of action from the federal securities laws.

II. THE SUPREME COURT STANDARD FOR IMPLYING CAUSES OF ACTION

A. *Borak and Its Progeny*

In *J.I. Case Co. v. Borak*,¹³⁷ the Supreme Court sustained an implied cause of action for remedial relief in favor of shareholders for losses resulting from deceptive proxy solicitations in violation of section 14(a) of the Exchange Act.¹³⁸ *Borak* set forth a two-part test for implication of private remedies under the federal securities laws: If the statute's "chief purpose" is to benefit the plaintiff¹³⁹ and if the implication of a remedy is necessary to effectuate Congress' purpose in enacting the statute, then an implied private remedy is appropriate.¹⁴⁰

A decade later, the Supreme Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*¹⁴¹ and *Securities Investor Protection Corp. v. Barbour*¹⁴² limited *Borak* by using the principle of statutory construction *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another.¹⁴³ In *Amtrak*, the National Association of Railroad Passengers brought an action to enjoin Amtrak's planned cancellation of certain passenger trains, alleging that Amtrak's action would violate section 307(a) of the Rail Passenger

136. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 15–16.

137. 377 U.S. 426 (1964).

138. See notes 60–68 *supra* and accompanying text.

139. 377 U.S. at 432.

140. *Id.* at 433. See also Note, *supra* note 135, at 631; Comment, *An Analytical Framework for Implied Causes of Action: Section 17 of the Securities Exchange Act and Redington v. Touche Ross & Co.*, 59 B.U. L. REV. 157, 163 (1979).

141. 414 U.S. 453 (1974).

142. 421 U.S. 412 (1975).

143. 414 U.S. at 458; 421 U.S. at 418–20. *Borak* never considered whether the availability of SEC enforcement should trigger the use of the *exclusio* rule. 377 U.S. at 432. Justice Clark wrote: "Private enforcement of the proxy rules provides a necessary supplement to Commission action." *Id.*

Service Act of 1970.¹⁴⁴ The Court reversed the Court of Appeals for the District of Columbia Circuit¹⁴⁵ and held that section 307(a) of the Act does not create a private cause of action¹⁴⁶ because "the remedies created in § 307(a) [enforcement by the Attorney General¹⁴⁷] are the exclusive means to enforce the duties and obligations imposed by the Act."¹⁴⁸

The *Barbour* Court addressed the issue of whether customers have an implied cause of action under the Securities Investor Protection Act of 1970 to compel the Securities Investor Protection Corporation to act.¹⁴⁹ Citing *Amtrak* for the *exclusio* rule,¹⁵⁰ *Barbour* reversed the Court of Appeals for the Sixth Circuit¹⁵¹ and held that the SEC has the exclusive authority to bring suit against the Corporation under the Act.¹⁵²

B. Cort v. Ash

In 1975, the Supreme Court incorporated elements of *Borak* and *Amtrak* in formulating a then-definitive four-part test for implying private remedies for violations of federal statutes. In *Cort v. Ash*,¹⁵³ a stockholder of Bethlehem Steel Corporation brought a derivative suit for injunctive relief and damages, charging that the Bethlehem corporate directors violated a criminal statute by making unlawful presidential campaign contributions.¹⁵⁴ In an opinion by Justice Brennan, the Court first dismissed the shareholder's claim for injunctive relief, noting that the Federal Election Campaign Act Amendments of 1974,¹⁵⁵ enacted after the court of appeals' decision, constituted controlling intervening law.¹⁵⁶ The Amendments allowed the Federal Election Commission to receive citizen complaints and authorized the Attorney General to seek an

144. 414 U.S. at 454-55. Section 307(a) of the Rail Passenger Service Act is set forth in 45 U.S.C. § 547(a) (1976).

145. *Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co.*, 475 F.2d 325 (D.C. Cir. 1973).

146. 414 U.S. at 464-65.

147. 45 U.S.C. § 547(a) (1976).

148. 414 U.S. at 458.

149. 421 U.S. at 413-14.

150. *Id.* at 419.

151. *SEC v. Guaranty Bond and Sec. Corp.*, 496 F.2d 145 (6th Cir. 1974). *Barbour* was acting as the receiver for Guaranty.

152. 421 U.S. at 424.

153. 422 U.S. 66 (1975).

154. *Id.* at 68. The statute at issue was section 610 of the Federal Election Campaign Act, 18 U.S.C. § 610 (1970) (repealed 1976).

155. Pub. L. No. 93-443, 88 Stat. 1263 (1974).

156. 422 U.S. 74 (1975).

injunction. Accordingly, the Court held that these Amendments relegated the shareholder's complaint for injunctive relief to the Federal Election Commission.¹⁵⁷

The shareholder's action for damages was also dismissed, but for different reasons. The Court held: "[I]mplication of such a federal cause of action is not suggested by the legislative context of § 610 [of the Federal Election Campaign Act] or required to accomplish Congress' purposes in enacting the statute."¹⁵⁸ Justice Brennan listed "several factors" which were "relevant" to the Court's decision:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"^[159]—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?^[160] Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?^[161] And finally, is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?^[162]

The Court denied the damage remedy after answering the first three questions in the negative and the last question in the positive.¹⁶³

The four factors which Justice Brennan indicated only as "relevant" retained their vitality until the Supreme Court modified

157. *Id.* at 74-77.

158. *Id.* at 69.

159. *Id.* at 78 (citing *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)). *Rigsby* was the first case in which the Court implied a private remedy from a federal statute. The first case to imply a private remedy under the federal securities laws was *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (private cause of action for damages under the Exchange Act's rule 10b-5).

160. 422 U.S. at 78 (citing, *e.g.*, *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*)).

161. *Id.* (citing, *e.g.*, *Amtrak*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); and *Calhoon v. Harvey*, 379 U.S. 134 (1964)).

162. *Id.* (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *cf.* *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-95 (1971); *id.* at 400 (Harlan, J., concurring); *J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964)).

163. First: The "protection of ordinary stockholders was at best a secondary concern." 422 U.S. at 81. Second: legislative silence would be overcome only if it were "clear that federal law has granted a class of persons certain rights . . ." *Id.* at 82. Third: "Recovery of derivative damages by the corporation . . . would not cure the influence which the use of corporate funds . . . may have had on a federal election." *Id.* at 84. Finally: The plaintiff's action for the directors' breach of their fiduciary duty in a state court was held to be an adequate remedy. *Id.*

the fourth *Cort* factor in *Piper v. Chris-Craft Industries, Inc.*¹⁶⁴ In *Piper*, the Court weighed the merits of an implied cause of action under section 14(e) of the Exchange Act and concluded that "a tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under § 14(e)."¹⁶⁵

In applying the four-part *Cort* test, Chief Justice Burger, writing for the majority, reasoned that under the first *Cort* factor, the issuing corporation's shareholders and not the tender offeror were to be especially benefited by the Williams Act.¹⁶⁶ Under the second *Cort* factor, he determined that it was Congress' intent to curb the unregulated activities of tender offerors. This purpose, therefore, negated the contention that tender offerors should be given an implied private damage remedy.¹⁶⁷ Under the third *Cort* factor, Chief Justice Burger reasoned that awarding damages to a defeated tender offeror would not be consistent with the congressional purpose of protecting the issuing corporation's shareholders.¹⁶⁸ Indeed, that corporation's shareholders would indirectly bear the burden of satisfying a damage award against the issuer.¹⁶⁹

In addressing the fourth *Cort* factor, Chief Justice Burger recognized the "pervasiveness of federal securities regulation,"¹⁷⁰ which would apparently justify an implied cause of action. He then stated, however, that since the tender offeror would probably

164. 430 U.S. 1, 40-42 (1977). See Pitt, *Standing To Sue Under the Williams Act After Chris-Craft: A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117, 171-73 (1978).

165. 430 U.S. at 42 n.28. Section 14(e) of the Exchange Act, as added by the Williams Act, Pub. L. No. 90-439, 82 Stat. 457 (1968), codified at 15 U.S.C. § 78n(e) (1976), is a broad antifraud provision which provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

For a definition of a tender offer see note 33 *supra*.

166. 430 U.S. at 37.

167. *Id.* at 38.

168. *Id.* at 39.

169. *Id.*

170. *Id.* at 40. When the Williams Act was passed, only one state had laws which governed tender offers. See VA. CODE §§ 13.1-528-.1-541 (1968); 3 BLUE SKY L. REP. (CCH) ¶¶ 60,201-14. Over half of the states now have tender offer laws. See Subcomm. on Proxy Solicitations and Tender Offers of the ABA Comm. on Federal Regulation of Securities, *State Takeover Statutes and The Williams Act*, reprinted in 32 BUS. LAW. 187 (1976); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976).

be able to maintain "a cause of action under common-law principles of interference with a prospective commercial advantage,"¹⁷¹ that it would be entirely appropriate to relegate the tender offeror's claim to a state court. Under this analysis, the final *Cort* factor's inquiry into whether the cause of action is *traditionally* relegated to state law becomes virtually irrelevant. The *Piper* test, instead, relegates the plaintiff to the state court whenever there is the *possibility* of a common-law cause of action.¹⁷²

C. The Current Standard

1. Touche Ross & Co. v. Redington

In 1979, the Supreme Court continued its evolution of the standard for implied private causes of action in *Touche Ross & Co. v. Redington*.¹⁷³ In that case, Touche Ross, a firm of certified public accountants, had audited the accounts of Weis Securities, Inc., a brokerage firm.¹⁷⁴ After Weis became insolvent and was liquidated,¹⁷⁵ Redington was appointed trustee in the liquidation on behalf of Weis' customers¹⁷⁶ and filed an action against Touche Ross for \$51 million in damages. Redington alleged that Touche Ross made an "improper audit and certification of the 1972 Weis financial statements and preparation of answers to the Exchange financial questionnaire [in violation of section 17(a) of the Exchange Act]."¹⁷⁷ The Court of Appeals for the Second Circuit found that section 17(a) imposed a duty of care on accountants in

171. 430 U.S. at 40-41.

172. For a discussion of the *Piper* Court's treatment of the fourth *Cort* factor, see Pitt, note 164 *supra*, at 171-73.

173. 442 U.S. 560 (1979).

174. *Id.* at 563.

175. *Id.* at 564.

176. *Id.* at 565.

177. *Id.* at 565-66. The Securities Investor Protection Corporation also was seeking \$14 million in damages. *Id.* In 1972, the date relevant to *Touche Ross*, section 17(a), as set forth in 15 U.S.C. § 78q(a) (1970), provided:

Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Section 17 was substantially amended in 1975. The present section 17(a)(1) contains essen-

the preparation of audits¹⁷⁸ and concluded that a breach of this section 17(a) duty "gives rise to an implied private right of action for damages in favor of a broker-dealer's customers"¹⁷⁹

Justice Rehnquist, writing for a seven to one majority of the Supreme Court,¹⁸⁰ began: "Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari."¹⁸¹ In reversing the Second Circuit, Justice Rehnquist, using Justice Brennan's original language from *Cort*, referred to the factors expressed there as being only "relevant": "[*Cort*] did not decide that each of these factors is entitled to equal weight. The central inquiry remains [the second *Cort* factor—]whether Congress intended to create, either expressly or by implication, a private cause of action."¹⁸² Justice Rehnquist analyzed the issue of congressional intent by focusing on three elements of statutory construction: statutory language,¹⁸³ the legislative history of the statute¹⁸⁴ and the overall statutory scheme, including an application of the *exclusio* rule.¹⁸⁵

a. *Language—Does the language purport to create a private remedy?*¹⁸⁶ In answering this initial question, Justice Rehnquist pointed to two helpful indices. First, the language must at least prohibit certain conduct or create a federal right in favor of private parties.¹⁸⁷ In concluding that the language of section 17(a)

tially the same language as the first sentence of the 1970 version of section 17(a). Compare 15 U.S.C. § 78q(a) (1970) with 15 U.S.C. § 78q(a)(1) (1976).

178. *Redington v. Touche Ross & Co.*, 592 F.2d 617, 621 (2d Cir. 1978).

179. *Id.* at 622.

180. Justice Marshall filed a dissenting opinion applying all four *Cort* factors. 442 U.S. at 580-83. See notes 208-14 *infra* and accompanying text. Justice Powell took no part in the determination of the case.

181. 442 U.S. at 562 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)).

182. 442 U.S. at 575. "The present Court, mindful of preserving the vitality of democratic processes, may be more deferential to the legislative judgments, it is more likely to give some weight to federalism, and it is more conventional in demanding compliance with jurisdictional and standing requirements." Powell, *What the Justices are Saying*, 62 A.B.A.J. 1455 (1976).

183. 442 U.S. at 569-71.

184. *Id.* at 571.

185. *Id.* at 571-74.

186. *Id.* at 568.

187. *Id.* at 569 (citing, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (federal right to receive equality of treatment in federally funded education programs regard-

does not prohibit conduct or create rights, Justice Rehnquist noted that section 17(a) requires only that certain individuals keep records and file reports as prescribed by the SEC.¹⁸⁸ Second, the language must not be forward-looking and seeking to forestall an event, but must instead be retrospective and provide recompense after the event.¹⁸⁹ Justice Rehnquist stated that section 17(a) is forward-looking because it seeks to forestall insolvency of broker-dealers by providing the Commission with sufficient warning of the financial collapse of a broker-dealer. Section 17(a), he concluded, does not reflect on an event such as insolvency and does not seek to provide recompense.¹⁹⁰ After applying these two factors, Justice Rehnquist answered the first question in the negative and concluded that the language of the statute did not purport to create a private remedy.¹⁹¹

b. *Legislative history*—*Does the legislative history suggest an intent by Congress to either create or deny private remedies?*¹⁹² In answering this question, Justice Rehnquist warned that if the legislative history is silent, then “implying a private right of action . . . is a hazardous enterprise, at best.”¹⁹³ With respect to section 17(a), Justice Rehnquist stated that “the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a).”¹⁹⁴ He found, therefore, no support for an implied private remedy. Justice Rehnquist concluded that the legislative history does not support a finding that Congress intended to create an implied private right for the enforcement of section 17(a).

less of sex); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975) (federal right to receive equal employment opportunities regardless of race); *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (fraud is prohibited conduct under the Exchange Act); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (federal right to convey a leasehold of realty coupled with a club membership regardless of race); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (federal right to vote regardless of state regulations which have the effect of denying citizens their right to vote because of race); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (federal right to purchase a home regardless of race); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (the issuance of false or misleading proxy solicitation materials is prohibited conduct under the Exchange Act)).

188. 442 U.S. at 569. See note 177 *supra*.

189. 442 U.S. at 570 (citing *Cort v. Ash*, 422 U.S. at 79).

190. *Id.* at 570–71. See note 177 *supra*.

191. 442 U.S. at 571.

192. *Id.*

193. *Id.* But see *J.I. Case Co. v. Borak*, 377 U.S. at 432, stating: “While this language [section 14(a)] makes no specific reference to a private right of action, among its chief purposes is ‘the protection of investors,’ which certainly implies the availability of judicial relief where necessary to achieve that result.”

194. 442 U.S. at 576.

c. *Statutory scheme*—Does the statutory scheme allow for a private remedy?¹⁹⁵ Justice Rehnquist, citing two reasons, answered this question in the negative. First, he thought it highly improbable that Congress absentmindedly forgot to mention an implied private action.¹⁹⁶ Since section 17(a) is flanked by section 16(b)¹⁹⁷ and section 18(a)¹⁹⁸ of the Exchange Act, both of which explicitly grant private causes of action, it seems evident that Congress certainly could have created a private remedy in section 17(a) if it had so intended.¹⁹⁹ Second, Justice Rehnquist applied the *exclusio* rule, stating that when a statute expressly provides a particular remedy or remedies, a court must be cautious of reading other remedies into the statute.²⁰⁰ Justice Rehnquist acknowledged that section 18(a) may have been intended to be the exclusive remedy for misstatements in reports filed with the SEC.²⁰¹ Yet, the Court declined to decide whether section 18(a)

195. *Id.* at 571.

196. *Id.* at 572 (referring to *Cannon v. University of Chicago*, 441 U.S. at 741 (Powell, J., dissenting)). In *Cannon*, after pointing out that in the four years after *Cort* was decided twenty courts of appeals' decisions implied private actions from federal statutes, Justice Powell remarked: "It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action." 441 U.S. at 742 (Powell, J., dissenting).

197. 15 U.S.C. § 78p(b) (1976). Section 16(b) was designed to protect outside shareholders against short-swing speculation by insiders with advance information. "Short-swing transactions in securities are those in which a purchase and sale or sale and purchase by the same person occur within a six month period." D. VAGTS, *supra* note 3, at 833. Section 16(b), as set forth in 15 U.S.C. § 78p(b) (1976), provides in pertinent part:

Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter

198. 15 U.S.C. § 78r(a) (1976). Section 18(a), as set forth in 15 U.S.C. § 78r(a) (1976), provides:

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

199. 442 U.S. at 572.

200. *Id.* at 572-74.

201. Specifically, the Court noted that:

provided the exclusive remedy for a violation of section 17(a). Justice Rehnquist instead reasoned that because the remedial provisions of section 18(a) were enacted contemporaneously with section 17(a), the Court would remain extremely reluctant to imply from section 17(a) a remedy broader than that provided in section 18(a).²⁰²

The plaintiff in *Touche Ross*, Redington, argued that the Court's inquiry under *Cort* should not end with statutory construction; the Court should also consider whether an implied private remedy was necessary to effectuate Congress' purpose in passing the statute and whether the action was one traditionally relegated to state law.²⁰³ Redington contended that such considerations supported the cause of action, urging that private enforcement of section 17(a) was an essential supplement to SEC action and that section 17(a) was "a matter of federal, not state, concern."²⁰⁴ Justice Rehnquist responded that the four *Cort* factors were merely "relevant" and not necessarily entitled to equal weight.²⁰⁵ He reasoned that, since all three statutory construction questions were answered in the negative, Congress obviously did not intend to create either an express or an implied private remedy under section 17(a).²⁰⁶

In his dissent, Justice Marshall argued that all four *Cort* factors should be examined, not just the second *Cort* factor regarding

Senator Fletcher in introducing the bill that formed the basis for the 1934 Act, stated that "Section [18] imposes civil liability for false or misleading statements in any of the reports or records required under this act." Richard Whitney, President of the New York Stock Exchange, testified at length regarding the 1934 Act proposals. In testimony before the Senate Committee on Banking & Currency, he indicated his understanding that § 18(a) liability extended to "persons transacting business in securities."

Id. at 574 n.15 (emphasis supplied).

202. *Id.* at 573. But see *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2d Cir. 1979) (holding that a cause of action may be maintained under section 10(b) of the Exchange Act, even though the defendant's conduct also constitutes a violation of section 18(a)).

203. 442 U.S. at 575.

204. *Id.*

205. *Id.*

206. *Id.* at 575-76. Redington, citing *Borak*, also argued that section 27, 15 U.S.C. § 78aa (1976) (set forth in note 62 *supra*), grants jurisdiction to federal courts over violations of the Exchange Act. *Id.* at 576. In response, Justice Rehnquist stated:

The reliance . . . on § 27 is misplaced. Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' right must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision The Court in *Borak* found a private cause of action implicit in § 14(a).

Id. at 577.

legislative intent.²⁰⁷ Justice Marshall would have answered the first *Cort* factor in the affirmative because brokerage firm customers were the "favored wards" of section 17(a) and were, therefore, to be especially benefited by the statute.²⁰⁸ In analyzing the second *Cort* factor, Justice Marshall employed Justice Rehnquist's three-pronged statutory construction inquiry. First, Justice Marshall determined that the statutory language creates a private remedy because section 17(a) "does impose duties for the benefit of private parties; in that sense, it both generates expectations, on which customers may appropriately rely, that those duties will be performed, and prohibits conduct inconsistent with the obligations created."²⁰⁹ Second, he acknowledged the silence of legislative history as to private remedies under section 17(a).²¹⁰ Third, Justice Marshall argued that the *exclusio* rule should not apply to section 17(a) because the damage remedy in section 18(a) is of no help to brokerage customers. He noted that "false reports regarding a broker's financial condition would not affect the price of securities held by the broker's customers,"²¹¹ and hence would not generate damages under section 18(a).²¹² Justice Marshall concluded, therefore, that the second *Cort* factor should have been satisfied.

Justice Marshall agreed with Redington that the third *Cort* factor should have been answered affirmatively because private enforcement of section 17(a) is necessary to supplement Commission action.²¹³ He also agreed that the fourth *Cort* factor should have been supportive because "enforcement of [the Exchange Act's] . . . reporting provisions is plainly not a matter of traditional state concern, but rather relates to the effectiveness of federal statutory requirements."²¹⁴ Thus, Justice Marshall would have held all of the *Cort* factors to have been satisfied and would have implied a private damage remedy under section 17(a).

2. Transamerica Mortgage Advisors, Inc. v. Lewis

The most recent case to address the issue of implied private

207. *Id.* at 580 (Marshall, J., dissenting).

208. *Id.* at 581 (Marshall, J., dissenting).

209. *Id.* at 581 n.2 (Marshall, J., dissenting).

210. *Id.* at 581 (Marshall, J., dissenting).

211. *Id.* at 582 (Marshall, J., dissenting).

212. See note 198 *supra*.

213. 442 U.S. at 582 (Marshall, J., dissenting).

214. *Id.* at 582-83 (Marshall, J., dissenting).

causes of action, *Transamerica Mortgage Advisors, Inc. v. Lewis*,²¹⁵ applied the *Touche Ross* standard of implication to two sections of the Investment Advisers Act of 1940 (the Advisers Act).²¹⁶ Lewis, a shareholder of a trust which Transamerica advised and managed, brought a derivative action on behalf of the trust and a class action on behalf of the trust's shareholders.²¹⁷ Lewis sought damages for an alleged breach of Transamerica's fiduciary duty under section 206 and rescission of the contract under section 215 of the Advisers Act.²¹⁸ The Court of Appeals for the Ninth Circuit held that an implied private remedy for damages existed under section 206 and a similar right to equitable relief existed under section 215.²¹⁹

The Supreme Court unanimously affirmed the court of appeals' decision regarding the right of rescission under section 215. Justice Stewart wrote that section 215 of the Advisers Act did af-

215. 444 U.S. 11 (1979). See Underwood, *Transamerica Mortgage Advisors, Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action*, 7 PEP-PERDINE L. REV. 533 (1980).

216. 15 U.S.C. § 80b-1 to -21 (1976).

217. 444 U.S. at 13.

218. *Id.* Section 206, as set forth in 15 U.S.C. § 80b-6 (1976), provides:

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect [*sic*] any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Section 215, as set forth in 15 U.S.C. § 80b-15 (1976), provides in pertinent part:

Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

219. *Lewis v. Transamerica Corp.*, 575 F.2d 237, 239 (9th Cir. 1978).

ford a private right of action; the language of section 215 on its face renders void all contracts made in violation of the Advisers Act. Justice Stewart observed: "By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere."²²⁰

The more difficult question facing the Court was whether section 206 afforded Lewis a private right of action for damages. In a five to four decision on this issue, the Court held that section 206 does not afford a private damage remedy.²²¹ Justice Stewart, again writing for the majority, reached this holding by declaring that the central issue was whether Congress intended to create a private damage remedy under section 206.²²² To determine congressional intent, Justice Stewart employed the *Touche Ross* statutory construction analysis and inquired into the statute's language, legislative history and scheme of enforcement.

Justice Stewart answered the first *Touche Ross* question in the negative, noting that the statutory language neither created nor altered any civil liabilities.²²³ He answered the second *Touche Ross* question in the negative also, asserting that there was positive evidence of congressional intent *not* to authorize private damage actions under section 206.²²⁴ In answering the third *Touche Ross* question, Justice Stewart noted that the Advisers Act provides express remedies for enforcing section 206.²²⁵ Therefore, Justice Stewart concluded that the *exclusio* rule applied to section 206 and eliminated the possibility of implied remedies.²²⁶ The Court held, in accordance with *Touche Ross*, that negative responses to the three *Touche Ross* questions constituted sufficient evidence of congressional intent to deny a private damage remedy.²²⁷

220. 444 U.S. at 18.

221. *Id.* at 24 (Burger, C.J., and Blackmun, Powell, and Rehnquist, J.J., join Stewart, J. White, J., was joined in dissent by Brennan, Marshall, and Stevens, J.J.).

222. *Id.* at 15-16.

223. *Id.* at 19, 24.

224. *Id.* at 21-22. Justice Stewart pointed out that the early drafts of section 214, the Advisers Act's jurisdictional provision, gave the federal courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by" the statute. *Id.* (emphasis supplied). Section 214, 15 U.S.C. § 80b-14 (1976), as finally enacted "omitted any references to 'actions at law' or to 'liability.'" *Id.* at 22. "The unexplained deletion of a single phrase . . . is, of course, not determinative But it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." *Id.*

225. *Id.* at 20. See 15 U.S.C. §§ 80b-3, 80b-9, 80b-17 (1976).

226. *Id.* at 19-20.

227. *Id.* at 23-24.

The dissent in *Transamerica* paralleled the dissent in *Touche Ross* by arguing that the proper standard for implication was the *entire* four-part *Cort* test. Justice White, writing for the dissent, found that the first *Cort* factor had been satisfied because section 206 was intended to protect investors like the plaintiff.²²⁸ He disputed the majority's treatment of Congress' intent under the second *Cort* factor by taking issue with the majority's analysis of the legislative history. According to Justice White, the legislative history *did not* weigh against implication.²²⁹ After determining that the first two *Cort* factors were satisfied, Justice White examined the remaining *Cort* factors and decided that they militated in favor of implication.²³⁰ Because each of the *Cort* factors had been satisfied, Justice White concluded that the Court should imply a private damage remedy.²³¹

3. Congressional Criticism

Touche Ross and *Transamerica* have deemed congressional intent to be the critical issue when an implied private cause of action is asserted and have compelled courts to examine the statutory language, the statute's legislative history and the enforcement scheme of the pertinent statute. In recent amendments to the federal securities laws,²³² Congress criticized *Touche Ross*' and *Transamerica*'s focus on "strict construction of statutory language and expressed intent" as the standard for judicial implication of private remedies.²³³ Congress praised the *Borak* opinion's rationale which recognized a private remedy whenever it was necessary to effectuate Congress' statutory purpose.²³⁴ Congress intended:

228. *Id.* at 25 (White, J., dissenting). Justice White pointed out that the language of section 206 is "substantially similar" to the language of section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1980), "both of which have been held to create private rights of action for which damages may be recovered." *Id.* at 25 n.1 (citing *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)).

229. 444 U.S. at 31 (White, J., dissenting). Justice White dealt with the majority's discussion of the omission of the words "actions at law," discussed in note 224 *supra*, and concluded that "the significance of this omission is delphic at best." 444 U.S. at 31 (White, J., dissenting).

230. *Id.* at 34-36 (White, J., dissenting).

231. *Id.* at 36 (White, J., dissenting).

232. Small Business Investment Incentive Act, Pub. L. No. 96-477, 94 Stat. 2275 (1980).

233. H.R. No. 1341, 96th Cong., 2d Sess. 28 n.6, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4810 n.6.

234. *Id.* at 28, reprinted in [1980] U.S. CODE CONG. & AD. NEWS at 4810. See notes 60-68 *supra*.

to make plain that it expects the courts to imply private rights of action under this legislation [the Small Business Investment Incentive Act of 1980], where the plaintiff falls within the class of persons protected by the statutory provision in question. Such a right would be consistent with and further Congress' intent in enacting that provision, and such actions would not improperly occupy an area traditionally the concern of state law.²³⁵

This criticism of *Touche Ross* and *Transamerica*, however, is not dispositive of the question of an issuing corporation's standing to seek implied injunctive relief under section 13(d) of the Williams Act; by its terms it is applicable only to the Small Business Incentive Act. Nevertheless, the criticism appears to indicate what Congress might consider to be the test for implication of private remedies if the Williams Act were amended in the future.

III. THE APPLICATION OF *TOUCHE ROSS* TO SECTION 13(d)

A purchaser who has filed a false or misleading Schedule 13D is liable for damages under section 18(a) to any person "who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement"²³⁶ If no Schedule 13D is filed or the purchaser fails to remedy the defective Schedule 13D, the SEC may seek injunctive relief under section 21 to compel the filing of a truthful Schedule 13D.²³⁷ The SEC, however, does not always expeditiously seek injunctive relief in the federal courts.²³⁸ Under such circumstances, the task of enforcing section 13(d) and compelling the filing of a truthful Schedule 13D becomes the responsibility of the issuing corporation and its shareholders.²³⁹ Yet, the issuer's shareholders generally lack either the resources or the incentive to maintain an injunctive action.²⁴⁰ Moreover, section 13(d) provides no cause of action for the issuing corporation "seeking equitable or prophylactic re-

235. *Id.* at 29, reprinted in [1980] U.S. CODE CONG. & AD. NEWS at 4811 (citing *Cort v. Ash*, 422 U.S. 66 (1975)).

236. 15 U.S.C. § 78r(a) (1976) (set forth in full in note 198 *supra*).

237. 15 U.S.C. § 78u(d) (1976).

238. See notes 296-323 *infra* and accompanying text.

239. *GAF Corp. v. Milstein*, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

240. *Id.* The shareholders may be able to seek injunctive relief as a class, thereby defraying the cost of obtaining equitable relief. But see note 289 *infra*. For the availability of attorneys' fees, compare *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-92 (1970) (compelling payment of litigation costs by the corporation which had violated the securities laws rather than by plaintiffs) with *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-71 (1975) (denying recovery of attorneys' fees to the prevailing litigant).

lief—not monetary damages—[in order] to take the necessary steps to effectuate the purposes of section 13(d).”²⁴¹ Thus, the validity of an issuer’s implied cause of action for injunctive relief under section 13(d) must be determined by an application of *Touche Ross & Co. v. Redington*.²⁴²

A. *Language—Does the Language Purport to Create a Private Remedy?*

If a court seeks to imply a private cause of action for injunctive relief on behalf of an issuing corporation, it must address the first *Touche Ross* question: Does the language of section 13(d) suggest an intent by Congress to create such a private remedy?²⁴³ Section 13(d) reads in pertinent part:

Any person who, [after acquiring certain stock], is directly or indirectly the beneficial owner of more than 5 per centum of [certain stock] shall . . . send to the issuer . . . and file with the Commission, a statement containing . . . information . . . as the Commission may . . . prescribe as necessary or appropriate in the public interest or for the protection of investors.²⁴⁴

To answer this first *Touche Ross* question, the court must determine whether the statutory language either creates a federal right in the plaintiff or prohibits certain conduct for the benefit of the plaintiff.²⁴⁵ An example of a federal right created by statute can be found in *Cannon v. University of Chicago*.²⁴⁶ In that case, it was held that Title IX, with the admonition that “no person . . . shall, on the basis of sex . . . be subject to discrimination,”²⁴⁷ vested plaintiff Cannon with the federal right not to be discriminated against on the basis of sex and accordingly implied a private remedy to enforce that right. An example of statutory language that prohibits conduct can be found in *J.I. Case Co. v. Borak*,²⁴⁸ where it was held that section 14(a) of the Exchange Act prohibits improper proxy solicitation for the benefit of investors.²⁴⁹ Section

241. 453 F.2d at 720 n.22.

242. 442 U.S. 560 (1979). See notes 173–214 *supra* and accompanying text.

243. 442 U.S. at 568.

244. 15 U.S.C. § 78m(d)(1) (Supp. I 1979) (set forth in full in note 7 *supra*) (emphasis added).

245. 442 U.S. at 569.

246. 441 U.S. 677 (1979).

247. 20 U.S.C. § 1681 (1976).

248. 377 U.S. 426 (1964). See notes 60–68 *supra* and accompanying text.

249. 377 U.S. at 431. According to Justice Clark, “the purpose of 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.” *Id.*

14(a) provides in pertinent part:

It shall be unlawful for any person, by the use of the [jurisdictional means] . . . in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in *the public interest* or for *the protection of investors*, to solicit or to permit the use of his name to solicit any proxy.²⁵⁰

In contrast to Title IX, which creates a federal right, and section 14(a), which prohibits conduct, the terms of section 13(d) only require the purchaser to send a Schedule 13D to the SEC and the issuing corporation. The issuing corporation has the right to receive a truthful Schedule 13D, but this "right" is granted for the direct benefit of the issuer's shareholders, not for the benefit of the corporation in its issuing capacity.²⁵¹ Thus, as one court has noted, "Section 13(d) does not by its terms create or alter civil liability; rather, it simply requires certain conduct."²⁵²

The statutory language inquiry of *Touche Ross* also considered whether the language of the statute is forward-looking or retrospective.²⁵³ If the language is forward-looking, it weighs against implication. If the language is retrospective, it weighs in favor of implication.²⁵⁴ The language of section 13(d) is similar to the language of section 17(a) which was construed in *Touche Ross*.²⁵⁵ Section 17(a) provides in pertinent part: "[E]very broker or dealer registered pursuant to . . . this title, *shall make, keep, and preserve . . . such accounts, correspondence, . . . and make such reports*, as the Commission . . . may prescribe as necessary or appropriate in *the public interest* or for *the protection of investors*."²⁵⁶ Justice Rehnquist determined that this language was forward-looking: "In terms, § 17(a) simply requires broker-dealers and others to . . . file such reports as the Commission may prescribe. It does not, by its terms, purport to create a private cause of action in favor of anyone."²⁵⁷ Similarly, the language of section 13(d) is forward-looking in that purchasers "shall send" certain reports

250. 15 U.S.C. § 78n(a) (1976) (set forth in full in note 61 *supra*) (emphasis added).

251. See notes 324-26 *infra* and accompanying text.

252. *Gateway Indus., Inc. v. Agency Rent A Car*, 495 F. Supp. 92, 99 (N.D. Ill. 1980), discussed in text accompanying notes 100-18 *supra*.

253. 442 U.S. at 570.

254. See note 189 *supra* and accompanying text.

255. *Sta-Rite Indus., Inc. v. Nortek, Inc.*, 494 F. Supp. 358, 360 (E.D. Wis. 1980), discussed in text accompanying notes 127-31 *supra*.

256. 15 U.S.C. 78q(a) (1976) (set forth in full in note 177 *supra*) (emphasis added).

257. 442 U.S. at 569.

"in the public interest or for the protection of investors."²⁵⁸ Thus, under *Touche Ross*, section 13(d) seems to weigh against implication.

An example of retrospective language can be found in section 215 of the Advisers Act²⁵⁹ which was scrutinized in *Transamerica Mortgage Advisors, Inc. v. Lewis*.²⁶⁰ Section 215 reads in pertinent part: "Every contract made in violation . . . [of this subchapter] . . . shall be void" ²⁶¹ *Transamerica* implied a private remedy from this language, stating: "By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere."²⁶² Thus, section 215 provides recompense after the occurrence of violative conduct. If a contract is made in violation of the Advisers Act, section 215 provides that such a contract shall be void. While section 215 provides a remedy for a wrong, however, section 13(d) does not; section 13(d) merely requires purchasers to send a Schedule 13D to the SEC and to the issuing corporation. It appears, therefore, that section 13(d) was intended to forestall harm to the shareholder, rather than to provide recompense for wrongdoing.²⁶³

The terms of section 13(d) neither create a federal right in the issuing corporation, nor prohibit conduct for the benefit of the issuer. Moreover, the language of section 13(d) is forward-looking rather than retrospective. Thus, the language of section 13(d) does not suggest an intent by Congress to create a private cause of action for injunctive relief in the issuing corporation. Accordingly, the first *Touche Ross* statutory construction question must be answered in the negative.

B. *Legislative History—Does The Legislative History Suggest an Intent by Congress to either Create or Deny Private Remedies?*

In determining the propriety of implication, *Touche Ross* next considered whether the legislative history purports to create or

258. 15 U.S.C. § 78m(d)(1) (Supp. I 1979) (set forth in full in note 7 *supra*).

259. 15 U.S.C. § 80b-15 (1976) (set forth in part in note 218 *supra*).

260. 444 U.S. 11 (1979). See notes 214-31 *supra* and accompanying text.

261. 15 U.S.C. § 80b-15 (1976) (set forth in part in note 218 *supra*) (emphasis added).

262. 444 U.S. at 18-19. See L. LOSS, 3 SECURITIES REGULATIONS 1758-59 (2d ed. 1961). Section 29(b) of the Exchange Act, 15 U.S.C. § 78cc(b) (1976), is a voiding provision similar to section 215 of the Advisers Act. For an application of section 29(b), see *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970).

263. See notes 324-26 *infra* and accompanying text.

deny private relief to a plaintiff. Although Congress was silent as to private causes of action under section 13(d),²⁶⁴ the legislative history of the Williams Act does offer some interpretive assistance. Two pieces of legislative history appear to weigh in favor of implication, whereas other legislative history appears to weigh against implication.

First, the House Report of the Williams Act notes that the SEC believed that the Act would add little cost, if any, to the administration of the securities laws.²⁶⁵ This comment, reflective of the SEC's view and not that of Congress, suggests that the burden of enforcement would be on private parties rather than on the Commission.²⁶⁶ Second, Professor Israels, in a submission to the hearings on the Williams Act, wrote:

Presumably we may assume that the Commission will be able to enforce the provision of this Bill . . . and of its rules thereunder by proceedings for injunction in the Federal courts; and that under [*Borak*] a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities.²⁶⁷

This reasoning was asserted by the defeated tender offeror in *Piper v. Chris-Craft Industries, Inc.*²⁶⁸ who argued that since Congress was aware of *Borak* when it passed the Williams Act, "Congress was [also] aware that private actions were implicit in [the Williams Act]."²⁶⁹ Chief Justice Burger, writing for the majority in *Piper*, rejected such logic:

[T]his conclusion places more weight on the passing reference to [*Borak*] than can be reasonably carried. Only last Term we indicated that similar materials in the legislative history of the

264. *Touche Ross* warned that "implying a private right of action on the basis of congressional silence is a hazardous enterprise at best." 442 U.S. at 571. This warning is not very helpful, however, because if a private remedy is sought, the plaintiff will undoubtedly have conceded the absence of an explicit private remedy. If Congress had spoken to the issue, a court's task would be easy. As the Court in *Transamerica* pointed out, however, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." 444 U.S. at 18 (citing *Cannon v. University of Chicago*, 441 U.S. at 694).

265. H.R. REP. NO. 1711, *supra* note 49, at 7, reprinted in [1968] U.S. CODE CONG. & AD. NEWS at 2817.

266. The Commission's "presumed 'expertise' in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 41 n.27 (1977).

267. *Senate Hearings*, *supra* note 5, at 67.

268. 430 U.S. at 31. *See also* *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 32 n.8 (White, J., dissenting).

269. 430 U.S. at 31.

1934 Act were of limited value. "Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight."²⁷⁰

The legislative history of the Williams Act does not uniformly support implied causes of action. For example, the statement in the House Report that the Williams Act "avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid"²⁷¹ weighs against implication. Timing is crucial to the success or failure of takeover attempts by the preliminary acquisition of stock on the open market.²⁷² Such acquisitions are often precursors of cash tender offers²⁷³ and if a purchaser can be delayed in the takeover attempt, the issuer can take advantage of several defensive tactics.²⁷⁴ Therefore, a private cause of action for injunctive relief in the hands of the issuing corporation would provide an effective tool for the delay and perhaps defeat a takeover attempt by the purchaser.

Thus, it appears that the legislative history of section 13(d) does not expressly speak to private causes of action nor does the general legislative history of the Williams Act indicate an intent by Congress to create such a remedy under section 13(d). Neither the SEC's statement concerning the cost of enforcement nor Professor Israel's remark about *Borak* is given appreciable weight by the Court. Moreover, it may be argued that Congress' desire to maintain neutrality weighs against implication because a private cause of action for injunctive relief, if misused by the issuing corporation, would frustrate Congress' express desire not to tip the balance of regulation. The legislative history of section 13(d), therefore, does not suggest congressional intent to create a private

270. *Id.* at 31, n.20 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976)).

271. H.R. REP. NO. 1711, *supra* note 49, at 3, reprinted in [1968] U.S. CODE CONG. & AD. NEWS at 2813.

272. See generally E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 199 (1977).

273. *Id.* at 10-14.

274. W. PAINTER, *supra* note 47, at 404 n.44. Defensive tactics include:

arranging a so-called "defensive" merger with another company . . . , repurchasing shares, issuing more shares to a "friendly" party, increasing the dividend, splitting the stock, reincorporating in a state which has relatively strict rules on tender offers . . . , classifying the board of directors, amending the company's articles of incorporation or bylaws to require a high percentage of shareholder vote, or a class vote, to authorize mergers or other acquisitions, and inserting provisions in loan agreements or pension plans accelerating the maturity date of corporate obligations in the event of a change in control.

cause of action for injunctive relief for the issuer. Thus, the second *Touche Ross* statutory construction question must also be answered in the negative.

C. *Statutory Scheme—Does the Statutory Scheme Allow for a Private Remedy?*

The final question that *Touche Ross* posed to determine congressional intent was whether the statutory scheme allows for the implication of private remedies. In answering this question, Justice Rehnquist made two assumptions. The first assumption was that Congress knows how to create express private causes of action and, therefore, implied rights of action should be the exception, not the rule.²⁷⁵ A plaintiff, however, could cite two occasions upon which the Court has declined to afford conclusive weight to this assumption; the Court has recognized implied causes of action under section 14(a) in *Borak*²⁷⁶ and under section 10(b) in *Superintendent of Insurance v. Bankers Life & Casualty Co.*²⁷⁷ As previously indicated, however, the Court has discredited *Borak*,²⁷⁸ and Justice Rehnquist noted in *Touche Ross* that "this Court simply . . . acquiesced in the 25-year-old acceptance by the lower federal courts of an implied action under § 10(b)."²⁷⁹ In contrast, the history of implied private remedies under section 13(d) is limited to the decade since 1971 when *GAF Corp. v. Milstein*²⁸⁰ was decided.

The second assumption made by Justice Rehnquist in *Touche Ross* was that an express remedy in a statutory scheme excludes all other remedies—the *exclusio* rule.²⁸¹ A violation of section 13(d), like all other violations of the Exchange Act, is subject to an explicit administrative remedy. The SEC has express authority to investigate a section 13(d) violation under section 21(a),²⁸² express authority to bring suit for an injunction or writ of mandamus under sections 21(d) and (e)²⁸³ and express authority to submit evidence of any violation to the Attorney General for possible

275. 442 U.S. at 572. See note 57 *supra*.

276. 377 U.S. at 431. See notes 60–68 *supra* and accompanying text.

277. 404 U.S. 6, 13 n.9 (1971).

278. See notes 134–36 *supra* and accompanying text.

279. 442 U.S. at 577 n.19.

280. 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). See notes 81–90 *supra* and accompanying text.

281. 442 U.S. at 572–74.

282. 15 U.S.C. § 78u (1976).

283. *Id.* §§ 78u(d)–(e).

criminal proceedings against the violator under section 21(d).²⁸⁴

In accordance with this administrative remedy, an issuing corporation which faces a purchaser who neglects to file a truthful Schedule 13D should urge the SEC to seek an injunction under section 21. It would then be within the SEC's discretion to pursue the matter. Yet, the SEC may hesitate to bring suit when a take-over is imminent. As Manuel F. Cohen, former Chairman of the SEC, stated at the Williams Act hearings:

[O]ur concern really stems from sensitivity that the Government should stay out of involvement in these contests as much as possible. . . . We just did not want the Commission to be in the position perhaps of compelling changes or going to court because once you do that no matter how well you qualify what you are doing it is going to be used by the other parties as an argument that "the Government is against you." This is the reason why the Commission hesitates, unless no other course is possible, to go to court on these situations.²⁸⁵

Regardless of the SEC's hesitation, a strict application of the *exclusio* rule would deny the issuer an implied cause of action for injunctive relief under section 13(d).²⁸⁶

Thus, an issuing corporation, faced with a violation of section 13(d) by a purchaser, is left without the swift injunctive relief which would compel a purchaser to file a truthful Schedule 13D. Instead, the *exclusio* rule limits the issuer's remedy to the express administrative remedy provided by section 21. Although this technique of statutory construction may appear to sanction injustice, a majority of the *Touche Ross* Court accepted the rule as a method of limiting the implication of private remedies under the federal securities laws.

Because Congress created an express administrative remedy for the enforcement of the Exchange Act in section 21, the *exclusio* rule and *Touche Ross* compel the conclusion that the statutory scheme of section 13(d) does not suggest congressional intent

284. *Id.* § 78u(d). See also 15 U.S.C. § 78ff(a) (1976) (providing for criminal liability).

285. *House Hearings*, *supra* note 44, at 53 (statement of Manuel F. Cohen). Justice Stevens, dissenting in *Piper*, stated:

Although originally one might have argued that the private remedies created by the Securities Acts are limited to those expressly described in the legislation itself history forecloses any such argument today. The statutes originally enacted in 1933 and 1934 have been amended so often with full congressional awareness of the judicial interpretation of Rule 10b-5 as implicitly creating a private remedy, that we must now assume that Congress intended to create rights for the specific beneficiaries of the legislation as well as duties to be policed by the SEC.

430 U.S. at 55 n.4 (Stevens, J., dissenting).

286. See text accompanying note 211 *supra*.

to create a private cause of action for injunctive relief in the issuing corporation. The third *Touche Ross* statutory construction question, therefore, must also be answered in the negative.

In sum, *Gateway Industries, Inc. v. Agency Rent A Car*²⁸⁷ and *Sta-Rite Industries, Inc. v. Nortek, Inc.*²⁸⁸ applied the *Touche Ross* statutory construction standard for implication and found that issuing corporations do not have an implied cause of action for injunctive relief under section 13(d). The language, legislative history and statutory scheme of enforcement under section 13(d) were held to weigh against implication.²⁸⁹

Piper v. Chris-Craft Industries, Inc.,²⁹⁰ which predated *Touche Ross*, did recognize that in special circumstances the Court should look beyond principles of statutory construction to policy considerations when implying a private remedy. Although Chief Justice Burger denied the defeated tender offeror an implied damage remedy in *Piper* because it was "unnecessary to ensure the fulfillment of Congress' purposes in adopting the Williams Act,"²⁹¹ he nevertheless observed that private *injunctive* relief might be neces-

287. 495 F. Supp. 92, 99 (N.D. Ill. 1980). See notes 100-18 *supra* and accompanying text.

288. 494 F. Supp. 358, 363 (E.D. Wis. 1980). See notes 127-31 *supra* and accompanying text.

289. The issuer in *Gateway* argued that if standing were denied to the corporation *qua* corporation, then the issuing corporation should be granted standing as a representative of its shareholders. The issuer's standing as a representative of its shareholders, however, would still require a court to imply a private cause of action for the shareholders. The *Gateway* court admitted that for a corporate shareholder, implication would be a "closer question." 495 F. Supp. at 99. Further, *Gateway* stated, "[I]t is clear from the statutory language and legislative history that shareholders are the intended beneficiaries of the disclosure requirements of section 13(d)." *Id.* at 100.

The plaintiff in *Transamerica* also appeared to be a member of a class to be especially benefited by a federal statute (section 206 of the Advisers Act), but the language, legislative history and scheme of enforcement of the statute dictated the denial of a private remedy. See notes 215-31 *supra* and accompanying text. Justice Stewart wrote: "The mere fact that the statute was designed to protect advisors' clients does not require the implication of a private cause of action for damages on their behalf." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 24. See also *Touche Ross & Co. v. Redington*, 442 U.S. at 578.

In *Cannon v. University of Chicago*, Justice Stevens attempted to delineate the "especially benefited" factor as the "most accurate indicator of the propriety of implication of a cause of action." *Cannon v. University of Chicago*, 441 U.S. at 690 n.13. The majority in *Transamerica*, however, evidently rejected this factor as a litmus test for implication of private causes of action. 444 U.S. at 20. Under the *Touche Ross* analysis, as applied by *Transamerica*, the issuing corporation could not assert an implied remedy as a representative of its shareholders, because the shareholders themselves do not have an implied remedy under section 13(d). *Id.* at 24.

290. 430 U.S. 1 (1977).

291. *Id.* at 41.

sary to provide for effective enforcement of the Williams Act.²⁹² The Chief Justice remarked that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given.'"²⁹³

According to this reasoning, *Dan River, Inc. v. Unitex Limited*²⁹⁴ and *Kirsch Co. v. Bliss and Laughlin Industries, Inc.*²⁹⁵ might have been correct in implying an injunctive action for the issuing corporation. The validity of this conclusion, however, depends upon finding that the policy of supplemental enforcement is strong enough to override the strict principles of statutory construction set forth in *Touche Ross*.

IV. POLICY CONSIDERATIONS

A. Supplemental Enforcement

Despite the fact that the SEC is expressly authorized to enforce section 13(d) violations, the Commission admits that it is overburdened and frequently unable to adequately police the Williams Act provisions.²⁹⁶ Consequently, the SEC contends that private causes of action are necessary to effectuate the congressional purpose of protecting investors, including an issuing corporation's shareholders, through the Williams Act.²⁹⁷ *Touche Ross & Co. v. Redington*,²⁹⁸ however, rejected a similar argument: "We need not reach the merits of the arguments concerning the 'necessity' of implying a private remedy . . . , we believe such inquiries have little relevance to the decision of this case."²⁹⁹ Justice Rehnquist reached this result by reasoning that negative responses to the statutory construction questions were sufficient to indicate that Congress did not intend to provide a private damage remedy under

292. *Id.* at 42 n.28.

293. *Id.* at 42 (citing *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969) (opinion by Friendly, J.)).

294. 624 F.2d 1216 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (Jan. 12, 1981), discussed in text accompanying notes 91-99 *supra*.

295. 495 F. Supp. 488 (W.D. Mich. 1980), discussed in text accompanying notes 119-26 *supra*.

296. The SEC insists that "[e]ven more necessary [than in *Borak*] are such private rights of action to supplement SEC actions to effectuate the congressional purposes in enacting the Williams Act," Brief for SEC as *Amicus Curiae* 12." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 64 (1977) (Stevens, J., dissenting). The *Piper* majority rejected this argument. *Id.* at 41 n.27.

297. See 430 U.S. at 64 (Stevens, J., dissenting).

298. 442 U.S. 560 (1979), discussed in text accompanying notes 173-214 *supra*.

299. 442 U.S. at 575.

section 17(a) of the Exchange Act.³⁰⁰ The plaintiff in *Touche Ross* responded that a denial of supplemental enforcement sanctions injustice. Yet, Justice Rehnquist maintained that the Court is "not at liberty to legislate. If there is to be a federal damages remedy . . . Congress must provide it. '[I]t is not for [the Court] to fill any *hiatus* Congress has left in this area.'"³⁰¹

Notwithstanding the Court's rejection of the supplemental enforcement argument, the burden on the SEC to enforce the federal securities laws may be a substantial impediment to meaningful enforcement. Each year the SEC must review all of the filings required by the federal securities laws. Between 1969 and 1976, the number of filings made with the SEC pursuant to the Williams Act alone had increased from 321 to 1,184.³⁰² Moreover, the SEC annually receives several thousand complaints from private parties seeking redress.³⁰³ The SEC investigates between 1,000 to 1,500 of these complaints for possible violations of the federal securities laws³⁰⁴ and institutes approximately 100 injunctive actions annually.³⁰⁵

These figures illustrate the increasing burden upon the SEC and indicate the necessity of supplemental enforcement. In 1971, the *GAF Corp. v. Milstein*³⁰⁶ opinion asserted: "It is no answer to the query whether the issuer has standing to seek injunctive relief to respond that the Commission can proceed under penal provisions."³⁰⁷ Yet nine years later, when the SEC's burden of enforcing the securities laws had increased at least three-fold,³⁰⁸ *Sta-Rite*

300. *Id.* at 575-76.

301. *Id.* at 579 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963) (emphasis supplied)).

302. Pitt, *supra* note 164, at 164 n.352. As the SEC indicated:

[L]itigation alleging fraud by one side or the other in a contested tender offer occurs almost weekly. It is almost standard operating procedure. We have had to respond that we will investigate allegations of fraud to the extent they fall within our jurisdiction, and indeed we have. But owing to the time required for such investigations, it may be that the tender offer will be all over before the investigation is completed.

House Hearings, supra note 44, at 19. When *Piper* was decided, the SEC's professional staff in the Office of Tender Offers, Acquisitions and Small Issues was composed of only four professionals. Pitt, *supra* note 164, at 164 n.356.

303. SEC, 36TH ANNUAL REPORT 93 (1970).

304. SEC, 45TH ANNUAL REPORT 121 (1979).

305. *Id.* at 122.

306. 453 F.2d 709 (2d Cir. 1970), *cert. denied*, 406 U.S. 910 (1972).

307. *Id.* at 721.

308. Compare SEC, 36TH ANNUAL REPORT 224 (1970) with SEC, 45TH ANNUAL REPORT 122 (1979).

Industries, Inc. v. Nortek, Inc.,³⁰⁹ adopting *Gateway Industries, Inc. v. Agency Rent A Car's*³¹⁰ reasoning, answered the issuer's query with this response: "Instead, it is for the private issuing corporation, or its shareholders, to raise the issue of noncompliance initially with the SEC, and not the courts. It is then incumbent upon the SEC to investigate and bring an action in district court if it deems such to be necessary."³¹¹ It appears that these courts have ignored an obvious fact: without supplemental enforcement countless violations of section 13(d) will go unremedied and the congressional purpose of closing the gap in the federal securities laws will be undermined substantially.

The plaintiff in *J.I. Case Co. v. Borak*³¹² was successful when he outlined such a scenario and the Court sustained his action in the name of supplemental enforcement.³¹³ Yet fifteen years later, *Touche Ross* rejected the same argument:

The invocation of the "remedial purposes" of the 1934 Act is similarly unavailing. Only last Term, we emphasized that generalized references to the "remedial purposes" of the 1934 Act will not justify reading a provision "more broadly than its language and the statutory scheme reasonably permit." The ultimate question is one of Congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.³¹⁴

A significant deviation from this recent line of authority arose in *Dan River, Inc. v. Uniflex Limited*,³¹⁵ where the Fourth Circuit apparently chose to ignore Justice Rehnquist's rejection of the supplemental enforcement argument, stating: "[A] court simply cannot turn a blind eye to a potentially inaccurate filing when it possesses the injunctive power to have that filing corrected before irreparable harm occurs to the investing public."³¹⁶ It is presently uncertain whether the supplemental enforcement argument, as it applies to section 13(d), will be accepted by the federal courts

309. 494 F. Supp. 358 (E.D. Wis. 1980).

310. 495 F. Supp. 92 (N.D. Ill. 1980).

311. 494 F. Supp. at 362-63. See also 495 F. Supp. at 98.

312. 377 U.S. 426 (1964).

313. *Id.* at 432.

314. 442 U.S. at 578 (quoting *SEC v. Sloan*, 436 U.S. 103, 116 (1978)). In *Sloan*, Justice Rehnquist, writing for the majority, held that the SEC did not have the authority under section 12(k) of the Exchange Act, 15 U.S.C. § 78l(k) (1976), to issue a series of orders suspending the trading in a stock beyond the initial 10-day suspension period based on the same set of circumstances. *Id.* at 114. The SEC had urged that such action was required for the protection of investors. *Id.* at 114-15.

315. 624 F.2d 1216 (4th Cir. 1980), cert. denied, 449 U.S. 1101 (Jan. 12, 1981).

316. *Id.* at 1227.

which have yet to consider the issue. It is noteworthy, however, that the Supreme Court recently denied certiorari in *Dan River*.³¹⁷

If this policy argument is accepted by other courts, as it was by the Fourth Circuit in *Dan River*, the issuing corporation will generally be in the best position to assert an implied injunctive action:

The statute requires a copy of the statement to be sent by registered mail to the issuer (this provision alone might support the issuer's standing), and the issuer, in the course of constantly monitoring transactions in its stock, better than anyone else will know when there has been a failure to file. Moreover, the issuer has not only the resources, but the self-interest so vital to maintaining an injunctive action.³¹⁸

The shareholder, however, although able to gain access to the Schedule 13D,³¹⁹ does not have the issuing corporation's immediate access to the Schedule 13D. Likewise, the shareholder generally has neither the resources nor the incentive to pursue an injunctive action.³²⁰ Moreover, even if a shareholder succeeded in gaining an injunction against a purchaser, the shareholder could not collect money damages unless he or she met the purchaser/seller and reliance requirements of section 18(a).³²¹

In short, the issuer's pursuit of an implied injunctive remedy is a necessary supplement to SEC action.³²² Without such enforcement, the remedial purpose of the Williams Act would be virtually defeated.³²³ Accordingly, the policy consideration of supplemental enforcement to achieve Congress' goal of disclosure under section 13(d) weighs heavily in favor of implying private injunctive relief on behalf of the issuing corporation.

B. *The Williams Act's Neutrality*

The neutrality which Congress intended to be an important aspect of the Williams Act weighs against permitting an issuing corporation private injunctive relief. Former Chairman of the SEC, Manuel F. Cohen, testified before the Senate:

[T]he principal point is that we [the SEC] are not concerned with

317. 449 U.S. 1101 (Jan. 12, 1981).

318. *GAF Corp. v. Milstein*, 453 F.2d at 719 (citation omitted).

319. Because the Schedule 13D must be sent to the SEC and to each exchange where the security is traded, the Schedule becomes a matter of public record. 15 U.S.C. § 78m(d)(1) (Supp. I 1979) (set forth in full in note 7 *supra*).

320. 453 F.2d at 721.

321. *Id.* See note 12 *supra* and accompanying text.

322. 624 F.2d at 1223, 1227; 453 F.2d at 721.

323. 453 F.2d at 720. *Kirsch Co. v. Bliss & Laughlin Indus., Inc.*, 495 F. Supp. 488, 492 (W.D. Mich. 1980).

*assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial welfare. . . . The investor is lost somewhere in the shuffle. This is our concern and our only concern.*³²⁴

Professor Hayes, also before the Senate, stated that neither the bidder nor the defending management require any additional protection: "Rather, *the investor . . . is the one who needs a more effective champion. . . .*"³²⁵ Senator Williams made the statement that the Williams Act was "*designed solely to require full and fair disclosure for the benefit of investors.*"³²⁶

As evidenced by this legislative history, Congress intended the Williams Act to be scrupulously neutral and recognized that "takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management."³²⁷ This policy was announced in response to critics of the Williams Act who believed that if incumbent management were given any additional defensive weapons, those tender offers which serve as the only realistic method of ousting inefficient management would be hampered.³²⁸ One such critic reminded Congress of an incident involving the Boston and Maine Corporation. The president of that corporation, who had been convicted of misappropriating corporate property, "was given a raise in salary and an extension of his employment contract at the time extensions of employment contracts were given to other officers and directors."³²⁹ In such instances, takeover bids do serve a useful purpose, and the Williams Act's neutrality would be upset if the issuing corporation were given the opportunity to enjoin a purchaser by invoking private relief under section 13(d).

A bidder preparing a takeover will often attempt to establish a position in the target's securities before announcing a formal

324. *Senate Hearings, supra* note 5, at 178 (cited in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 27-28 (1977) (emphasis in original)).

325. *Id.* at 57 (cited in 430 U.S. at 29 (emphasis supplied)).

326. 113 CONG. REC. 24,664 (1967) (cited in 430 U.S. at 31 (emphasis supplied)).

327. S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967) (cited in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 n.8 (1975)). See notes 69-80 *supra* and accompanying text.

328. See notes 45-47 *supra* and accompanying text. Tender offers had gained popularity because proxy contests had become less effective for various reasons, including: "the inertia of stockholders, the fact that management had the use of corporate funds to purchase the securities of a disagreeing shareholder 'to protect corporate policy,' and the existence of strong allies for management—the investment bankers, institutional lenders, customers and suppliers, with whom management daily transacted business." Pitt, *supra* note 164, at 127.

329. *House Hearings, supra* note 44, at 63 (statement of Jordan Eskin).

tender offer³³⁰ and such preliminary stock purchases often trigger a duty to disclose under section 13(d).³³¹ Consequently, when such a strategy is in effect, the target issuer could forestall the takeover by initiating litigation after the preparatory stock purchases.³³² This tactic, in the hands of incumbent management, would certainly upset the neutrality of the Williams Act and could frustrate the salutary effects of a takeover.

It is important to note that the scope of section 13(d) is not limited to pre-tender offer acquisitions; any person who acquires a five percent interest in the issuer must file a Schedule 13D.³³³ The purchaser's future intentions do not bear on the obligation to file, and the purchaser may desire nothing more than a strong voice in the issuer's affairs. Nevertheless, the possibility of injunction poses danger in this latter situation; the self-interest of management may operate to still that legitimate voice by enjoining the purchaser from voting his or her shares.

These concerns were acknowledged, but dismissed, by the *Milstein* court:

To play upon management's self-interest, of course, raises some threat to Congress's express desire not to tip the scales in favor of incumbent management as against the takeover group. But, this danger can be adequately counteracted if the district court carefully scrutinizes self-serving management claims allegedly made in the interest of investor protection.³³⁴

Although *Milstein* recognized this threat to the neutrality of the Williams Act, it held private enforcement of section 13(d) by the issuing corporation to be appropriate.³³⁵ The Second Circuit concluded that since the SEC was overburdened and shareholders lacked both the ability and the incentive to enforce section 13(d) effectively, corporate action was a necessary supplement to SEC action.³³⁶

In *Gateway*, the Court rejected *Milstein's* reasoning, and stated: "It scarcely would further the goals of section 13(d) to permit an issuing corporation to sue on behalf of some unidentified

330. E. ARANOW, H. EINHORN & G. BERLSTEIN, *supra* note 272, at 10-14.

331. *Id.*

332. Young, *Section 13(d)—A New Element in The Battle For Control of Corporate Managements: The Implications of GAF Corporation v. Milstein*, 27 BUS. LAW. 1137, 1138 (1972).

333. 15 U.S.C. § 78m(d)(1) (Supp. I 1979) (set forth in full in note 7 *supra*).

334. 453 F.2d at 719-20.

335. *Id.* at 720.

336. *Id.* at 721.

group of shareholders who themselves may have no interest in pursuing an action."³³⁷ *Gateway's* conclusion, however, is open to criticism. Shareholders who are unidentified or disinterested are precisely the persons to whom Congress extended the protections of the Williams Act. Such shareholders are the "pawn[s] . . . lost somewhere in the shuffle"³³⁸ who would benefit most from their corporation's action under section 13(d). Notwithstanding *Gateway's* reasoning, such an action *would* further the goals of section 13(d).

Admittedly, the congressional intent not to favor one side or the other in a takeover attempt might be threatened if an issuer could pursue an injunction. This danger, however, must be weighed against the inevitable result which would follow if the issuing corporation could not pursue an injunction: violations of the Williams Act would go unremedied. Congress intended the Williams Act to close a gap in the disclosure provisions of the securities laws. Without private enforcement by issuing corporations, this gap will remain open. Although neutrality is a real concern, disclosure is more compelling. The concerns may be balanced effectively, as noted by the *Milstein* court, if "the district court carefully scrutinizes self-serving management claims allegedly made in the interest of investor protection."³³⁹

V. A PROPOSED AMENDMENT TO THE WILLIAMS ACT

In July of 1979, the Committee on Banking, Housing, and Urban Affairs wrote to the Chairman of the SEC, Harold M. Williams, concerning the enforceability of the Williams Act.³⁴⁰ Recognizing the Supreme Court's hesitance in granting private relief,³⁴¹ the Committee was "interested in reviewing whatever proposals the SEC ha[d] developed in light of its experience to restore to aggrieved persons access to the Federal courts in tender offer situations."³⁴² The SEC responded in February of 1980 by recom-

337. *Gateway Indus., Inc. v. Agency Rent A Car*, 495 F. Supp. at 101. Although the majority of investors do not read the Schedule 13Ds which are filed, the sophisticated investor does read the material and act accordingly. Professor Painter's "trickle down" theory asserts: "[I]f the prevailing market price of a security mirrors 'all the publicly available information, greater disclosure must lead to greater market efficiency.'" Note, *supra* note 135, at 673 n.263 (citing W. PAINTER, *supra* note 47, at 396).

338. *Senate Hearings*, *supra* note 5, at 178.

339. 453 F.2d at 719-20.

340. *Commission Report*, *supra* note 53, at 5.

341. *Id.* (citing *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977)).

342. *Id.*

mending "the enactment of a provision dealing with *private* rights of action for violations of the Williams Act provisions."³⁴³ The SEC cited the *Touche Ross & Co. v. Redington*³⁴⁴ and *Transamerica Mortgage Advisors, Inc. v. Lewis*³⁴⁵ decisions as the impetus for proposing an express private cause of action under the Williams Act.³⁴⁶

The SEC proposed to amend section 14 of the Exchange Act by adding subsection (i) which would grant standing to sue to all parties to a takeover attempt. Proposed section 14(i) provides in pertinent part:

(1) Any person who violates sections 13(d) [and/or the other provisions of the Williams Act], shall be liable to: [an issuing corporation or a shareholder of the issuer] . . . ; who is aggrieved by such violation, and the person so aggrieved may bring suit in any court of competent jurisdiction to recover damages and seek such equitable relief, including divestiture of securities acquired in violation of the [Williams Act] . . . ; *provided, however*, that no person shall be liable for damages under this subsection if he proves that he exercised reasonable care in the circumstances.³⁴⁷

In explanation of the proposal, the SEC reiterated its desire to primarily benefit the shareholders of the issuer.³⁴⁸ Yet, the SEC recognized:

[R]ealistically, individual shareholders (or even class representatives) cannot always be expected to pursue such claims. The secondary beneficiaries of the Williams Act—[the issuing corporations]—are often in a better position to enforce the Act's provisions in the face of transgressions than are shareholders. Giving them a right of action will help deter violations of these provisions in the course of battles for corporate control, and consequently will assist in carrying out the Congressional policies underlying the Williams Act.³⁴⁹

In order to ensure the effective enforcement of section 13(d) disclosure, Congress should be urged to act expeditiously and favora-

343. *Id.* at 79 (emphasis by the SEC).

344. 442 U.S. 560 (1979).

345. 444 U.S. 11 (1979).

346. *Commission Report*, *supra* note 53, at 80.

347. *Id.* at 96-97. Under the proposed section 14(i), in addition to injunctive relief, the issuing corporation or its shareholders could sue for damages regardless of whether they purchased or sold stock in reliance on a false filing as required under section 18(a). Proposed section 14(i)(2) requires only that the person show that he or she did not have knowledge of relevant facts which would be considered important in making investment decisions. *Id.* at 97-98.

348. *Id.* at 119.

349. *Id.* at 119-20.

bly upon this proposal.³⁵⁰

VI. CONCLUSION

Under the present Court's strict statutory construction standard for implication, it appears that an issuing corporation does not have an implied private remedy under section 13(d). If the disclosure requirement of section 13(d) is to be effective, however, the issuer must be able to supplement SEC action. Therefore, Congress must legislate the proposed express private cause of action for injunctive relief under the Williams Act. An express private remedy would facilitate the effective enforcement of section 13(d) and close the gap in the federal securities laws, thereby achieving the primary objective of the Williams Act.

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350. The ALI FED. SEC. CODE (1978 Proposed Official Draft), *reprinted in* W. PAINTER, *supra* note 47, would also expressly create a private cause of action for the issuing corporation and its shareholders. Section 1713 of the FED. SEC. CODE provides:

(b) On proof in an action by the issuer of a security that is the subject of a tender offer (or a proposed tender offer) or whose acquisition requires a filing under section 605(b) [similar to section 13(d) of the Exchange Act], a holder of such a security (or of another security whose interests are adversely affected), a person who has tendered a security pursuant to a tender offer, or a person who has made or proposes to make a tender offer, that the defendant has violated, is violating, or is about to violate section 605(b) . . . , a court may (1) enjoin a violation or further violation, (2) require compliance, (3) enjoin the voting of securities acquired in violation or the consummation of action authorized by their having been voted, (4) set aside action so consummated, (5) award damages against the violator for any loss caused by his violation, or (6) grant other appropriate relief (preliminary or final), including a combination of the types of relief here specified.

Id. at 416.